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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. [redacted]339

ANNE P. NEWMAN, SHARON W. NEAL and JOHN MUNGIN,

Petitioners,

v.

PIGGIE PARK ENTERPRISES, INC., a Corporation, and L. MAURICE BESSINGER.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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ANNE P. NEWMAN, SHARON W. NEAL and JOHN MUNGIN,

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v.

PIGGIE PARK ENTERPRISES, INC., a Corporation, and L. MAURICE BESSINGER.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above-entitled case on April 24, 1967.

Citation to Opinions Below

The opinion of the United States Court of Appeals for the Fourth Circuit is not yet reported, and is set forth in the appendix hereto, *infra* p. 1a. The decision of the United States district court for the district of South Carolina is reported at 256 F. Supp. 941, and appears in appendix *infra* p. 11a and in the record at pp. 206a *et seq.*

Jurisdiction

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on April 24, 1967. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

Question Presented

Whether the Court of Appeals correctly construed Title II of the Civil Rights Act of 1964 as denying recovery of counsel fees by Negroes excluded from places of public accommodation unless a showing is made that a restaurateur's patently frivolous defenses and obstructive tactics were the product of dishonesty and bad faith.

Statutory Provisions Involved

This case involves Title II of the Civil Rights Act of 1964, 42 U.S.C. §§2000a *et seq.*, and more particularly, 42 U.S.C. §2000a-3(b):

> In any action commenced pursuant to this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs. . . .

Statement

Negro plaintiffs instituted this class action December 18, 1964 against the corporate operator of a chain of six restaurants and its president and principal stockholder, seeking injunctive relief prohibiting exclusion of Negroes and recovery of counsel fees pursuant to the Civil Rights Act of 1964, 42 U.S.C. §§2000a *et seq.* The complaint alleged, in summary, that at various locations in South

Carolina the corporation operates restaurants which affect commerce and where Negroes are refused service (R. 1a-7a).

Defendants answered by denying Negroes were refused service; that operation of the restaurants affected commerce; and that the restaurants were places of "public accommodation" as that term is defined in the Civil Rights Act of 1964.[1] Defendants asserted that Title II is unconstitutional in violation of the Commerce Clause (Art. I, §8); the Privileges and Immunities Clause (Art. IV, §2); the Due Process and Equal Protection Clauses of the Fourteenth Amendment; and the Thirteenth Amendment to the Constitution of the United States. In addition, the corporation president alleged that service of food to Negroes, as required by Title II, violated his freedom of religion as protected by the First Amendment (R. 8a-10a; 11a-13a; 17a-20a).

At a trial, April 4-5, 1966 (R. 21a-205a), the facts as found by the district court were not materially disputed. The corporation operates six eating places, five of which are drive-ins located on major highways (R. 211a-212a). The sixth, Little Joe's Sandwich Shop, is in downtown Columbia, South Carolina with tables and chairs for approximately sixty customers (R. 212a). The district court found "at least" forty percent of the food purchased by the restaurants each year moved in commerce (R. 221a) and that the restaurants served many interstate travelers (R. 215a-216a). It concluded that the operation of the six restaurants affected commerce within the meaning of Title II, 42 U.S.C. §2000a-(c)(2).

---

[1] Defendants filed an answer February 5, 1965, an amended answer August 23, 1965 and were permitted by the district court to file a second amended answer March 19, 1966. All generally denied the allegations of the complaint.

Despite denials of Negro exclusion in the pleadings, the president of the corporation, a corporation bookkeeper, and a waitress testified that Negroes were served only on a kitchen door take-out basis (R. 160a, 169a, 172a, 189a). The district court found also that two plaintiffs had been denied service at one of the restaurants because of race (R. 214a-214a).

Although the district court found discrimination, and that operation of the six restaurants affected commerce, it excluded the five drive-ins from coverage on the ground that Congress had not intended Title II to apply to drive-ins. It entered an order enjoining racial discrimination at the Sandwich Shop only, awarded Negro plaintiffs their costs, but refused to award counsel fees, *infra* p. 34a (R. 229a).

Plaintiffs appealed to the United States Court of Appeals for the Fourth Circuit; the United States filed a brief *Amicus Curiae* supporting plaintiffs' position that the drive-in restaurants were covered by the Act. The Court of Appeals, sitting *en banc,* agreed holding that the district court should have enjoined racial discrimination at all restaurants operated by the defendants.

The Court of Appeals further instructed the district court "to consider the allowance of counsel fees, whether in whole or in part," and set forth the "subjective" test which district courts should apply to determine whether to permit recovery of counsel fees, *infra* p. 7a:

> In exercising its discretion, the district court may properly consider whether any of the numerous defenses interposed by defendants were presented for purposes of delay and not in good faith. But the test should be a subjective one, for no litigant ought to be punished under the guise of an award of counsel fees (or in any other manner) from taking a position

in court in which he honestly believes—however lacking in merit that position may be.

Judge Winter, with whom Judge Sobeloff joined, disagreed with the majority conclusion that "good faith, standing alone," should "immunize a defendant from an award against him." Judge Winter examined the relationship of the provision for recovery of counsel fees to enforcement of Title II, and concluded that a "subjective" test would frustrate compliance, *infra* p. 9a:

> In providing for counsel fees, the manifest purposes of the Act are to discourage violations, to encourage complaints by those subjected to discrimination and to provide a speedy and efficient remedy for those discriminated against. If counsel fees are withheld or grudgingly granted, violators feel no sanctions, victims are frustrated and instances of unquestionably illegal discrimination may well go without effective remedy. To immunize defendants from an award of counsel fees, honest beliefs should bear some reasonable relation to reality; never should frivolity go unrecognized.

Petitioners are represented by retained private counsel of Columbia, South Carolina, who have been assisted by salaried attorneys of a nonprofit civil rights organization. The award of counsel fees is sought only by the retained South Carolina counsel for their services, and not for others.

REASONS FOR GRANTING THE WRIT

Introduction

This is a case of first impression in this Court. The Court of Appeals has construed the counsel fees provision of the public accommodation Title of the Civil Rights Act of 1964 to authorize an award only when under a "subjective" test, a litigant takes a position "not in good faith." Unless a district court finds such a state of mind, a prevailing party is not entitled to recover counsel fees "however lacking in merit" the position taken or tactics employed by a discriminator.

We believe that such a construction of §2000a-3(b) seriously impairs the acknowledged congressional purpose "to assure rapid and effective compliance" with Title II, *infra* p. 7a; that limitation of an award to cases where bad faith is shown injects an element of culpability into the counsel fee provision unrelated to the purposes of Title II; and that the Court of Appeals, by limiting awards to occasions when a court of the United States would have been authorized to award a fee without statutory authority, has seriously misread the intent of Congress.

The counsel fee provision of Title II is an important means of promoting widespread compliance with the Act by placing restaurateurs on notice that frivolous refusal to comply promptly may lead to judicial proceedings in which the burden of expenses may be on the restaurant, not the wronged plaintiff, if the defendant resists on frivolous grounds or is dilatory in his defense. If restaurateurs are permitted to avoid an award of counsel fees on the basis that they honestly believe in a position, how-

ever lacking in merit that position may be, the incentive to comply promptly will be significantly reduced.

We call the Court's attention to the fact that discrimination in public accommodations remains a serious problem once a Negro leaves well-travelled interstate highways.[2] As a recent survey by the New York Times ("Integration in South: Erratic Pattern") put it:

> It is possible to motor through the green valleys of Virginia, veer through the cotton fields in Alabama and Mississippi, and end up in Texas cattle country with the conviction that racial segregation and discrimination are gone at last.
>
> You could get that impression if you dined at chain restaurants like Howard Johnson's, slept in chain motels such as the Holiday Inns, ...
>
> A different itinerary might leave you convinced that the South has not changed at all. Asking for a night's lodging in an obscure motel can be risky for

[2] While appellants have been unable to ascertain the precise number of Title II actions involving restaurants presently pending before the federal courts, the number of cases known to petitioners suggests that the total is large. See, *Little* v. *Sedgefield Inn,* No. C-180-G-65 (M.D. N.C.); *LeShore* v. *Carter,* No. 3614-65 (S.D. Ala.); *LeFlore* v. *Butlers Chick-a-Teria,* No. 4360-66 (S.D. Ala.); *Lawson* v. *Tito's Restaurant,* No. 4361-66 (S.D. Ala.); *Johnson* v. *Larry's Restaurant,* No. 4363-66 (S.D. Ala.); *Hughes* v. *Falgut,* No. 66-741 (N.D. Ala.; injunction entered April 13, 1967); *Gregory* v. *Myer,* appeal docketed, No. 32948 (U.S. Ct. of App. 5th Cir.); *Goodwill* v. *Presto Restaurant,* No. 4359-66 (S.D. Ala.); *Goodwill* v. *Fletcher's Bar-B-Que,* No. 4362-66 (S.D. Ala.); *Goode* v. *Johnny's Drive-in Restaurant,* No. 4358-66 (S.D. Ala.); *Goode* v. *Acme Cafe,* No. 4357-66 (S.D. Ala.); *Epps* v. *Krystal Co.,* No. 66-648 (N.D. Ala.); *Braxton* v. *Jeanette,* No. 505 (E.D. N.C.); *Bates* v. *Bonner Private Club,* No. 1222 (S.D. Ga.); *Mitchell* v. *Krystal Co.,* No. 65-579 (S.D. Ala.); *Nesmith* v. *Raleigh YMCA,* No. 1768 (M.D. N.C.); *Wooten* v. *Moore,* No. 631 (E.D. N.C.); *Stout* v. *YMCA of Bessemer,* No. 66-715 (S.D. Ala.); *Rax* v. *Piper,* No. 11,307 (W.D. La.); *Miller* v. *Amusement Enterprises, Inc.,* appeal docketed, No. 24,259 (U.S. Ct. App. 5th Cir.); *Kyles* v. *Paul,* appeal docketed, No. 18824 (U.S. Ct. App. 8th Cir.)

> a Negro who wants to avoid embarrassment. And in countless small towns, independent restaurants cater mainly to an all-white clientele, and Negroes still watch movies from segregated balconies.

(N. Y. Times, May 29, 1967, P. 1, Col. 1)

In enacting Title II, Congress labored long to fashion a scheme which would assure prompt compliance by nearly all eating facilities because it is scant consolation to the Negro interstate traveler that many restaurants are desegregated if the one he enters continues to discriminate. Commerce is burdened by the very uncertainty that all eating facilities are not desegregated. As it limits application of the counsel fee provision to the unusual case where the elusive concept of manifest insincerity is demonstrated, the construction given §2000a-3(b) by a majority of the court of appeals only serves to stiffen resistance to the elimination of discrimination in public accommodations.

The Court of Appeals incorrectly construed Title II of the Civil Rights Act of 1964 to permit recovery of counsel fees only upon a showing of subjective bad faith

In actions brought to desegregate public accommodations, the Civil Rights Act of 1964 provides that a prevailing party may recover reasonable attorney's fee (42 U.S.C. §2000a-3(b)):

> In any action commenced pursuant to this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs . . . .

The court of appeals, sitting *en banc*, directed the district court to exercise its discretion to award counsel fees only if it found subjective bad faith, *infra* p. 7a:

> "In exercising its discretion, the district court may properly consider whether any of the numerous defenses interposed by defendants were presented for purposes of delay and not in good faith. But the test should be a subjective one, for no litigant ought to be punished under the guise of an award of counsel fees (or in any other manner) from taking a position in court in which he honestly believes—however lacking in merit that position may be."

The court below, therefore, has construed §2000a-3(b) to make the vagrant notion of good faith a complete defense to recovery of counsel fees regardless of how patently frivolous or how obstructive the tactics employed. Such a construction is a variance with the congressional purpose in enacting §2000a-3. As Judges Winter and Sobeloff put it, *infra* p. 9a:

> In providing for counsel fees the manifest purposes of the Act are to discourage violations, to encourage complaints by those subjected to discrimination and to provide a speedy and efficient remedy for those discriminated against. If counsel fees are withheld or grudgingly granted, violators feel no sanctions, victims are frustrated and instances of unquestionably illegal discrimination may well go without effective remedy. To immunize defendants from an award of counsel fees, honest beliefs should bear some reasonable relation to reality; never should frivolity go unrecognized.

The soundness of Judge Winter's construction of the section is demonstrated by the legislative history of Title II

as a whole and §2000a-3(b) in particular. Title II demonstrates a plain desire to deter any substantial or prolonged litigation which is inconsistent with the narrow construction below of §2000a-3(b). For example, 42 U.S.C. §2000a-3(a) permits intervention by the Attorney General in privately initiated public accommodation suits, appointment of counsel for a person aggrieved, and "the commencement of the civil action without the payment of fees, costs or security." 42 U.S.C. §2000a-5 authorizes the Attorney General to commence litigation where there is "a pattern or practice of resistance to the full enjoyment" of Title II rights. 42 U.S.C. §2000a-2 broadly prohibits any attempt to punish, deprive, or interfere with rights to equal public accommodations. See *Georgia* v. *Rachel*, 384 U.S. 780 (1966); *Hamm* v. *City of Rock Hill*, 379 U.S. 306 (1964). "The Act as finally adopted was most comprehensive, undertaking to prevent through peaceful and voluntary settlement discrimination in . . . public facilities" *Heart of Atlanta Motel* v. *United States*, 379 U.S. 241, 246 (1964). The counsel fee provision of 42 U.S.C. §2000a-3(b) is part of the congressional plan for deterring evasion and resistance to the "full and equal enjoyment of the goods, services, facilities, privileges, advantages and accommodations of any place of public accommodation," 42 U.S.C. §2000a-(a). Although the court below found that in enacting Title II "Congress intended to assure rapid and effective compliance with its terms," *infra* p. 7a, it construed §2000a-3(b) in a manner which makes "rapid and effective compliance" more, not less, difficult.

The legislative record is scanty, but such debate as relates to §2000a-3 evidences intent to induce compliance by penalizing the assertion of frivolous claims. On the other hand, there is no support in the legislative history for the notion that frivolity must be combined with a

subjective mental state evincing bad motives. In fact, when Senator Ervin sought to eliminate the provision from the Act on the ground that it would make those benefiting from it special favorites of the law and would encourage "ambulance chasing" his amendment was rejected, 110 Cong. Rec. 14201, 14213-14 (June 17, 1964). Senator Pastore made a brief statement in defense of the provision stating that its purpose was deterrence of frivolous suits and " . . . the court within its discretion is given power to order payment of attorneys' fees to the prevailing party. . . . It is not favoritism towards one party as against the other," 110 Cong. Rec. 14214 (June 17, 1964).[3] Senator Miller emphasized the deterrence of frivolous litigation. He saw no need to delete the section because attorneys would be compensated only if they raised positions with merit:

> . . . I believe that this is the answer to the Senator from North Carolina, that if we are concerned about ambulance chasing, we had better realize that the ambulance chasers are not about to be in the business if there is no profit in it for them. They will be in the business only if they can make a profit. They

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[3] Senator Pastore stated:

> The purpose of this provision in the modified substitute is to discourage frivolous suits. Here, the court within its discretion is given power to order payment of attorneys' fees to the prevailing party. First of all, it is within the discretion of the court. It is not favoritism towards one party as against the other. When a person realizes that he takes the chance of having attorneys' fees assessed against him if he does not prevail, he will deliberate before he brings suit. He will make certain that he is not on frivolous ground. (110 Cong. Rec. 14214, June 17, 1964).

Senator Pastore's emphasis on frivolous *suits* is clearly explained by the character of the challenges raised to the section by Senator Ervin. The only construction of Senator Pastore's remarks consistent with their context and the language employed in the statute is that the provision was meant to penalize the assertion of frivolous claims by either party.

> are not going to make such profit out of any cases except those which are meritorious, so I believe that the point is exaggerated, and I believe the amendment is inadvisable (110 Cong. Rec. 14214, June 17, 1964).

Thus, the Senators concerned spoke of the counsel fee provision as if its application turned on merit or lack of it, not good or bad faith.[4] But, as the record here demonstrates, to limit recovery of counsel fees to occasions of subjectively determined bad faith makes the application of §2000a-3(b) turn on a principle which has only fortuitous relation to the deterrence of extended noncompliance and frivolous litigation. The facts of this case show tactics and frivolous defenses which unjustifiably delayed compliance and complicated petitioners burden of proof, but, unless one chooses to infer bad faith, they do not demonstrate any state of mind.

The defendant corporation in this case pursued various claims that 42 U.S.C. §2000a-(c)(2) was unconstitutional years after that question had been definitively resolved by this Court in *Katzenbach* v. *McClung*, 371 U.S. 291 (December 14, 1964). Indeed, it filed a second amended answer raising such defenses March 30, 1966, after "carefully reviewing the pleadings heretofore filed" (R. 16a). Defendants also denied their activities affected commerce forcing petitioners to offer lengthy proof. But after trial, the district court, which erroneously excluded the drive-in facilities on another ground, had no trouble determining that all six facilities were clearly covered by the Act both

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[4] A construction of §2000a-3(b) which makes an award of fees turn on objective factors is not inconsistent with the discretion it lodges in the district courts. That discretion is appropriately exercised to determine the application of objective standards and the amount of counsel fees which should be awarded, not to determine whether or not petitioners shall receive any counsel fees solely because a restaurateur may honestly believe that frivolous or dilatory tactics are justifiable.

because a substantial portion of the corporation's food moved in commerce and because it served or offered to serve interstate travelers. Either circumstance satisfies the "affect commerce" standard of the Act. Likewise, "The fact that the defendants had discriminated both at Piggie Park's drive-ins and at Little Joe's Sandwich Shop was of course known to them, yet they denied the fact and made it necessary for the plaintiffs to offer proof, and the defendants could not and did not undertake at the trial to support their denials," *infra* p. 10a. Finally, defendants contended the Act was invalid because it "contravenes the will of God" and constitutes an interference with the "free exercise of the Defendant's religion," *infra* p. 10a.

These defendants have done, therefore, just what Congress sought to deter. "The district judge should be told that in awarding counsel fees, he should include an amount which fully compensates plaintiffs for the time, effort and expenses of counsel in overcoming these elements of expense needlessly imposed on them" without a showing of bad faith, *infra* p. 10a.

Federal equity courts have inherent power to grant counsel fees in a narrow class of cases where manifest insincerity and bad faith have been shown. *Rolax* v. *Atlantic Coastline Railroad Co.*, 186 F.2d 473 (4th Cir. 1951); *Bell* v. *School Board of Powhatan County*, 321 F.2d 494, 500 (4th Cir. 1963). In §2000a-3(b), however, Congress plainly intended something more than statutory codification of an already existing equitable authority for Congress authorized payment of a reasonable fee to the prevailing party in the face of objections that such a provision was unusual and did so in the context of a comprehensive and delicate scheme for achieving prompt

change in the discriminatory practices of numerous restaurateurs. This Court should not conclude, as did the Court of Appeals, that Congress meant to add nothing to the power of the federal courts by passage of §2000a-3(b).

CONCLUSION

WHEREFORE, petitioners pray that the petition for writ of certiorari be granted.

Respectfully submitted,

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APPENDIX

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Opinion of the United States Court of Appeals For the Fourth Circuit

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No. 10,860.

Anne P. Newman, Sharon W. Neal
and John Mungin,
Appellants,

versus

Piggie Park Enterprises, Inc., a Corporation
and L. Maurice Bessinger,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA, AT COLUMBIA. CHARLES E. SIMONS, JR., DISTRICT JUDGE.

(Argued February 6, 1967. Decided April 24, 1967.)

Before HAYNSWORTH, Chief Judge, and SOBELOFF, BOREMAN, BRYAN, BELL, WINTER and CRAVEN, Circuit Judges.

Opinion of the United States Court of Appeals For the Fourth Circuit

CRAVEN, Circuit Judge:

This is a class action brought to obtain injunctive relief and the award of counsel fees under Title II of the Civil Rights Act of 1964, 42 U.S.C.A. §§2000a to a-6. Plaintiffs appeal from the decision of the district court holding that Negro citizens may be barred on account of their race and color from buying and eating barbecue at certain drive-in restaurants in South Carolina. We disagree and reverse.*

The facts as found by the district court are not in dispute. Briefly stated,[1] Piggy Park Enterprises, Inc. (L. Maurice Bessinger is the principal stockholder and general manager) owns and operates five eating establishments specializing in southern style barbecue, all of which are located on or near interstate highways.[2]

All of Piggy Park's eating places are of the drive-in type. In order to be served, a customer drives upon the premises in his automobile and places his order through an intercom. When he pushes a button, his order is taken by an employee inside the building who is usually out of sight of the customer. A curb attendant delivers the food or beverage to the customer's car and collects for the same. Orders are served in disposable paper plates and cups. The food is served in such a way that it is ready for consumption. Half the customers eat in their automobiles while parked on the

---

* Judge J. Spencer Bell voted in conference with the other members of the court to reverse. His untimely death on March 19, 1967, prevented his participation in the preparation of this opinion.

[1] For a detailed statement see *Newman* v. *Piggy Park Enterprises, Inc.*, 256 F. Supp. 941 (D.S.C. 1966).

[2] There was a sixth place, known as Little Joe's Sandwich Shop, held by the district court to be within 42 U.S.C.A. §2000a(b)(2). Injunctive relief was granted and no appeal was taken.

premises. There are no tables, chairs, counters, bars, or stools at any of the drive-ins sufficient to accommodate any appreciable number of patrons.

Although Piggy Park and Bessinger denied in their Answer and two amended Answers that plaintiffs had been denied service at one or more of Piggy Park's drive-ins, it was uncontested at the trial that Piggy Park denied full and equal service to Negroes because of their race at all of its eating places.[3]

The district court erroneously concluded that Piggy Park's drive-ins were not covered by the federal public accommodations law contained in the Civil Rights Act of 1964.[4] The court reasoned that the statute would not apply

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[3] The few Negro customers who have been served took their places and picked up their orders at the kitchen windows. They were not permitted to consume their purchases on the premises.

[4] The pertinent provisions of the Act are:

"§2000a. Prohibition against discrimination or segregation in places of public accommodation—Equal access

"(a) All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.

"(b) Each of the following establishments which serves the public is a place of public accommodation within the meaning of this subchapter if its operations affect commerce, or if discrimination or segregation by it is supported by State action:

"(1) ...

"(2) any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility, principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any real establishment; or any gasoline station;

"(3) ... ; and

"(4) ...

"(c) The operations of an establishment affect commerce within the meaning of this subchapter if (1) ... (2) in the case of an establish-

to a drive-in eating place unless a majority of the prepared food sold was actually consumed by the customers on the premises. It found from the testimony of Mr. Bessinger that fifty percent of his food volume was consumed on the premises and fifty percent off the premises, and from that finding of fact concluded that the drive-ins were *not* facilities "principally engaged in selling food for consumption on the premises."

Such a construction, we think, finds no support in congressional history. The Congress did not intend coverage of the Act to depend upon a head count of how many people eat on the premises or a computation of poundage or volume of food eaten. If it had so intended, it would have been a simple matter to change the questioned phrase "for consumption on the premises" to read "actually consumed on the premises."

During the House hearings,[5] the Attorney General said "the areas of coverage should be clear to both the proprietors and the public." If the "commerce" tests[6] are the principal criteria, and we think they are, clarity of coverage is promoted. A traveler can then intelligently assume that an eating place on an *interstate* highway is covered. Under

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ment described in paragraph (2) of subsection (b) of this section, it serves or offers to serve interstate travelers or a substantial portion of the food which it serves, or gasoline or other products which it sells, has moved in commerce; . . ." 42 U.S.C.A. §2000a(a)-(c).

[5] *Hearings on H.R. 7152 Before the House Committee on the Judiciary,* 88th Cong., 1st Sess., pt. 4, at 2655 (1963).

[6] There are two in the disjunctive:

"(c) The operations of an establishment affect commerce . . . if . . . it serves or offers to serve interstate travelers *or* a substantial portion of the food which it serves . . . has moved in commerce." 42 U.S.C.A. §2000a(c).

the district court's fifty percent test of actual consumption on the premises, prospective Negro customers would have no idea whether or not they might be served and would continue to occupy the intolerable position—at least with respect to drive-ins—in which they found themselves prior to passage of the Act with respect to interstate travel.[7] In a mobile society, the ready availability of prepared, ready-to-eat food is a practical necessity—not a luxury.

In our view, the emphasis in the phrase "principally engaged in selling *food* for consumption on the premises" is properly on the word "food". The term "principally" did not appear in the bill as introduced. It was added by the House Judiciary Committee and retained in the same form when the House version of the coverage provisions was ultimately adopted in the Senate. Its inclusion was not intended to have any bearing upon the percentage of food consumed on the premises, but was intended only to exclude from coverage places where food service was incidental to some other business, *e.g.*, bars and "Mrs. Murphy" tourist homes serving breakfast as a matter of convenience to overnite lodgers. Given the intention of Congress to eliminate bars,[8] the meaning of "principally" comes into

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[7] That the test is absurdly impractical is illustrated by Bessinger's testimony that consumption on premises varied with the weather. On such a hypothesis, a given drive-in might be covered one day, week, or month, and not at other times.

[8] See statement of Senator Magnuson, Chairman of the Senate Committee on Commerce and principal floor spokesman in the Senate for Title II, that "a bar in the strict sense of that word would not be covered by Title II since it is not 'principally engaged in selling food for consumption on the premises'." 110 Cong. Rec. 7406 (1964).

We find no legislative history suggesting that "principally" was inserted to eliminate eating places doing a predominantly carry-out service.

clear focus. Nothing in the 1964 Act as introduced or in any revision made before its enactment except for the addition of the word "principally" would exclude bars (and other places such as bowling alleys and pool rooms) serving food as an incident to other business.

The words in the statute "for consumption on the premises" modify the prior word "food" and describe the *kind* of food sold by other facilities that are covered similar to restaurants, cafeterias, lunchrooms, lunch counters, and soda fountains. The Congress clearly meant to extend its power beyond the ordinary sit-down restaurant and just as clearly did not undertake to legislate with respect to grocery type food stores which would have been covered but for the modifying phrase "for consumption on the premises." Thus, food stores are *not* covered, but stores (or facilities) that sell food of a *particular type, i.e.*, ready for consumption on the premises, *are* covered. What the customers actually *do* with the ready-to-eat food was not the concern of the Congress—whether they eat it then and there or subsequently and elsewhere.

The sense of this plan of coverage is apparent. Retail stores, food markets, and the like were excluded from the Act for the policy reason that there was little, if any, discrimination in the operation of them. Negroes have long been welcomed as customers in such stores. See 110 Cong. Rec. 6533 (1964) (remarks of Senator Humphrey).

Discrimination with respect to ready-to-eat food service facilities *was* a problem. When a substantial minority of American citizens are denied restaurant facilities—whether sit-down or drive-in—that are open to the public, unquestionably interstate commerce is burdened. *Katzenbach* v. *McClung*, 379 U.S. 294 (1964). It was this evil the Congress

sought to eliminate to the end that *all* citizens might freely and not inconveniently travel between the states. We think the Congress plainly meant to include within the coverage of the Act all restaurants, cafeterias, lunchrooms, lunch counters, soda foutains, and *all other facilities* similarly engaged as a main part of their business in selling food ready for consumption on the premises. We are further of the opinion that the statutory language accomplished that purpose.

COUNSEL FEES

Title II as a whole demonstrates that the Congress intended to assure rapid and effective compliance with its terms.[9] 42 U.S.C.A. Section 2000a-3(b) authorizes the court, in its discretion, to allow the prevailing party (other than the United States) a reasonable attorney's fee as part of the costs. By reason of our reversal of the district court, the plaintiffs now become the "prevailing party", and on remand we instruct the district court to consider the allowance of counsel fees, whether in whole or in part.

In exercising its discretion, the district court may properly consider whether any of the numerous defenses interposed by defendants were presented for purposes of delay and not in good faith. But the test should be a subjective one, for no litigant ought to be punished under the

[9] Thus, 42 U.S.C.A. §2000a-3(a) permits intervention by the Attorney General in privately initiated public accommodation suits, appointment of counsel for a person aggrieved, and "the commencement of the civil action without the payment of fees, costs or security." 42 U.S.C.A. §2000a-5 authorizes the Attorney General to commence litigation where there is "a pattern or practice of resistance to the full enjoyment" of Title II rights. 42 U.S.C.A. §2000a-2 broadly prohibits any attempt to punish, deprive, or interfere with rights to equal public accommodations. See *Georgia* v. *Rachel*, 384 U.S. 780 (1966).

guise of an award of counsel fees (or in any other manner) from taking a position in court in which he honestly believes—however lacking in merit that position may be.

The court may also consider whether the defendants acted in good faith in denying discrimination against Negroes and thus requiring proof of what was subsequently conceded to be true. A litigant who increases the burden upon opposing counsel by such tactics ought ordinarily bear the cost of unnecessary trial preparation. The so-called "general denial" is not countenanced by the Federal Rules of Civil Procedure.

Reversed and Remanded for Consideration of the Award of Counsel Fees.

Opinion of the United States Court of Appeals For the Fourth Circuit

WINTER, Circuit Judge, with whom SOBELOFF, Circuit Judge, joins, concurring specially:

Wholeheartedly I agree that Title II of the Civil Rights Act of 1964, 42 U.S.C.A. §2000a, *et seq.*, is applicable to Piggie Park's drive-in type facilities, and I join in the reasons advanced for that conclusion. I agree also that the case should be remanded for consideration of an award of counsel fees, but I conclude that good faith, standing alone, should not always immunize a defendant from an award against him. Specifically, in this case, defendants are not entitled to the defense of good faith in regard to the major portion of their defenses.

The district judge is told that in exercising his discretion he should "consider whether any of the numerous defenses interposed by defendants were presented for purposes of delay and not in good faith" because no defendant ought to be punished for "taking a position in court in which he honestly believes—*however lacking in merit that position may be.*" (emphasis supplied) In this case, defendants interposed defenses patently frivolous, and I would not permit them to avoid the costs of overcoming such defenses on a purely subjective test of good faith.

In providing for counsel fees, the manifest purposes of the Act are to discourage violations, to encourage complaints by those subjected to discrimination and to provide a speedy and efficient remedy for those discriminated against. If counsel fees are withheld or grudgingly granted, violators feel no sanctions, victims are frustrated and instances of unquestionably illegal discrimination may well go without effective remedy. To immunize defendants from an award of counsel fees, honest beliefs should bear some reasonable relation to reality; never should frivolity go unrecognized.

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While the threat of an award of counsel fees ought not be used to discourage non-frivolous defenses asserted in good faith, the district court should be instructed to make an allowance in regard to some of defendants' defenses and, in its discretion, to consider an allowance for the remainder of defendants' defenses depending upon its determination of defendants' good faith and honest belief. Those clearly compensable are defendants' assertion that their "Little Joe's Sandwich Shop," a sit-down facility shown overwhelmingly by the proof to be a place where service was refused to Negro citizens, was not subject to the Act. The fact that the defendants had discriminated both at Piggie Park's drive-ins and at Little Joe's Sandwich Shop was of course known to them, yet they denied the fact and made it necessary for the plaintiffs to offer proof, and the defendants could not and did not undertake at the trial to support their denials. Includable in the same category are defendants' contention, twice pleaded after the decision in *Katzenbach* v. *McClung,* 379 U.S. 294 (1964), that the Act was unconstitutional on the very grounds foreclosed by *McClung;* and defendants' contention that the Act was invalid because it "contravenes the will of God" and constitutes an interference with the "free exercise of the Defendant's religion." The district judge should be told that, in awarding counsel fees, he should include an amount which fully compensates plaintiffs for the time, effort and expenses of counsel in overcoming these elements of expense needlessly imposed on them.

Only as to the remaining defenses do I think that defendants' good faith is the issue. If good faith is found not to have existed as to them, an additional award of counsel fees on a like basis should be made.

Opinion and Order of District Court

ANNE P. NEWMAN, SHARON W. NEAL and JOHN MUNGIN,

Plaintiffs,

v.

PIGGIE PARK ENTERPRISES, INC., a Corporation, and L. MAURICE BESSINGER,

Defendants.

Civ. A. No. AC-1605

UNITED STATES DISTRICT COURT
D. South Carolina, Columbia Division
July 28, 1966

ORDER

SIMONS, District Judge.

This suit was commenced December 18, 1964 by plaintiffs, who are Negro citizens and residents of South Carolina and of the United States, on behalf of themselves and others similarly situated, pursuant to Rule 23(a) (3) of the Federal Rules of Civil Procedure. Jurisdiction of this court is expressly conferred by Title II, Section 207 of the Civil Rights Act of 1964, 42 U.S.C. Section 2000a-6.[1]

[1] "§2000a-6. *Jurisdiction; exhaustion of other remedies; exclusiveness of remedies; assertion of rights based on other Federal or State laws and pursuant of remedies for enforcement of such rights*

"(a) The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this subchapter and shall exercise the same without regard to whether the aggrieved party shall

The gravamen of plaintiffs' complaint is that corporate defendant operates several restaurants in Columbia and elsewhere in South Carolina which are places of public accommodation within the purview of the Civil Rights Act of 1964; and that defendant violated said Act by denying service to plaintiffs at certain of its restaurants on July 3rd and August 12th, 1964 solely upon the ground that they were Negroes. The complaint further specifically alleges that in their restaurants defendants serve and offer to serve interstate travelers; that a substantial portion of the goods which they serve move in interstate commerce; and that defendants' operations affect commerce between the states. Plaintiffs ask that defendants be temporarily and permanently enjoined from discriminating against plaintiffs and the class of persons they represent upon the ground of race, color, religion and national origin.

Defendants admit jurisdiction of the court under Section 2000a-6, supra, generally deny the material allegations of plaintiffs' complaint, and specifically deny the allegations of the complaint which allege that their establishments are places of public accommodation as defined in the Civil Rights Act of 1964. Although defendants concede that they cater to white trade only and refuse to

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have exhausted any administrative or other remedies that may be provided by law.

"(b) The remedies provided in this subchapter shall be the exclusive means of enforcing the rights based on this subchapter, but nothing in this subchapter shall preclude any individual or any State or local agency from asserting any right based on any other Federal or State law not inconsistent with this subchapter, including any statute or ordinance requiring nondiscrimination in public establishments or accommodations, or from pursuing any remedy, civil or criminal, which may be available for the vindication or enforcement of such right. Pub. L. 88-352, Title II, §207, July 2, 1964, 78 Stat. 245."

serve members of the Negro race at their restaurants for on-the-premises consumption of food, they stoutly maintain that they do not come within the coverage of Section 2000a(b) (2) and (c) (2) of the Act, infra note 2, because (1) they do not serve the public as required by the Act; (2) they are not principally engaged in selling food for consumption on the premises; (3) they do not serve or offer to serve interstate travelers; and (4) they do not serve food, a substantial portion of which has moved in commerce.

Defendants further contend that all foodstuffs served by them which are processed in this state, including cattle and hogs slaughtered in South Carolina, although shipped in commerce from another State to this State, cannot be considered as moving in interstate commerce under the Act; that the Act denies defendants "due process of law and/or equal protection of the law" as guaranteed by the Fourteenth Amendment; that the phrase "substantial portion of the food which it serves * * * has moved in commerce" is so vague and indefinite as to be impossible to determine whether a business operation comes within the Act; and further, that the Act violates defendants' "property right and right of liberty protected by the Fifth Amendment."

Defendant Bessinger further contends that the Act violates his freedom of religion under the First Amendment "since his religious beliefs compel him to oppose any integration of the races whatever."

The constitutionality of the public accommodations section, Title II of the Civil Rights Act of 1964, 42 U.S.C. Section 2000a, has been fully considered and determined by the United States Supreme Court in Heart of Atlanta

Motel, Inc. v. United States, et al., 379 U.S. 241, 85 S.Ct. 348, 13 L.Ed.2d 258 (1964); Katzenbach v. McClung, 379 U.S. 294, 85 S.Ct. 377, 13 L.Ed.2d 290 (1964); see also Willis v. Pickrick Restaurant, D.C., 231 F.Supp. 396 (1964), appeal dismissed, Maddox v. Willis, 382 U.S. 18, 86 S.Ct. 72, 15 L.Ed.2d 13 (1965).

The constitutional questions posed by defendants herein were before the Supreme Court in *McClung* and *Atlanta Motel*, supra, and were decided adversely to defendant's contentions. Consequently, defendant's defenses founded upon the due process and equal protection clauses of the Fourteenth Amendment, the Fifth Amendment, and the Commerce Clause of the Constitution are found by the court to be without merit in view of the *McClung* and *Atlanta Motel* cases, supra. It is noted that in *McClung*, *Atlanta Motel* and *Pickrick Restaurant* the motel and restaurants involved were admittedly places of public accommodation under the Act, there being no factual issue as to whether they came within the purview of same. Neither was any question raised that the restaurants involved therein were not principally engaged in selling food for consumption on the premises. The sole consideration before the lower court and the Supreme Court in those cases was the question of the constitutionality of the public accommodations provisions of the Act (Section 2000a).

[2, 3] Neither is the court impressed by defendant Bessinger's contention that the judicial enforcement of the public accommodations provisions of the Civil Rights Act of 1964 upon which this suit is predicated violates the free exercise of his religious beliefs in contravention of the First Amendment to the Constitution. It is unques-

tioned that the First Amendment prohibits compulsion by law of any creed or the practice of any form of religion, but it also safeguards the free exercise of one's chosen religion. Engel v. Vitale, 370 U.S. 421, 82 S.Ct. 1261, 8 L.Ed.2d 601 (1962). The free exercise of one's beliefs, however, as distinguished from the absolute right to a belief, is subject to regulation when religious acts require accommodation to society. United States v. Ballard, 322 U.S. 78, 64 S.Ct. 882, 88 L.Ed. 1148 (1944) (Mails to defraud); Reynolds v. United States, 98 U.S. 145, 25 L.Ed. 244 (1878) (polygamy conviction); Prince v. Commonwealth of Massachusetts, 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645 (1943) (minor in company of ward distributing religious literature in violation of statute). Undoubtedly defendant Bessinger has a constitutional right to espouse the religious beliefs of his own choosing, however, he does not have the absolute right to exercise and practice such beliefs in utter disregard of the clear constitutional rights of other citizens. This court refuses to lend credence or support to his position that he has a constitutional right to refuse to serve members of the Negro race in his business establishments upon the ground that to do so would violate his sacred religious beliefs.

The sole question for determination under the circumstances of instant case is whether any or all of defendants' eating establishments are places of public accommodation within the meaning and purview of Section 201 of Title II of the Civil Rights Act of 1964 (Section 2000a).[2] In ar-

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[2] "*§2000a. Prohibition against discrimination or segregation in places of public accommodation—Equal access*

"(a) All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section,

riving at this determination the court is primarily concerned with the following factual and legal questions, which will be considered in inverse order hereinafter: (1) Is corporate defendant's establishments, or any of them, "principally engaged in selling food for consumption on the premises"; (2) Does said defendant at its establishments serve or offer "to serve interstate travelers"; and (3) has "a substantial portion of the food which it serves, * * * or other products which it sells * * * moved in commerce"?

Should the court's answer to question #1 be in the affirmative, and either questions #2 or #3 in the alternative in the affirmative, then such of defendants' establishments are places of public accommodation within the

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without discrimination or segregation on the ground of race, color, religion, or national origin.

"*Establishments affecting interstate commerce or supported in their activities by State action as places of public accommodation; lodgings; facilities principally engaged in selling food for consumption on the premises; gasoline stations; places of exhibition or entertainment; other covered establishments*

"(b) Each of the following establishments which serves the public is a place of public accommodation within the meaning of this subchapter if its operations affect commerce, or if discrimination or segregation by it is supported by State action:

"(1) * * *

"(2) any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility, principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment; or any gasoline station;

"(3) * * *; and

"(4) * * *

"(c) The operations of an establishment affect commerce within the meaning of this subchapter if (1) * * * (2) in the case of an establishment described in paragraph (2) of subsection (b) of this section, it serves or offers to serve interstate travelers or a substantial portion of the food which it serves, or gasoline or other products which it sells, has moved in commerce; * * *"

purview of the Act, and plaintiffs are entitled to the requested relief as to these establishments.

The cause was heard by the court on April 4th and 5th, 1966. Subsequently excellent briefs and arguments have been filed by counsel for the parties. After a careful consideration of the evidence and the law and pursuant to Rule 52(a) of Federal Rules of Civil Procedure the court makes its findings of fact and conclusions of law.

Findings of Fact

1. Defendant Piggie Park Enterprises, Inc., hereinafter designated as Piggie Park, is a South Carolina corporation with its principal office in Columbia, South Carolina. Defendant L. Maurice Bessinger, hereinafter designated as Bessinger, is the principal stockholder and general manager of the corporate defendant.

2. Piggie Park owns, operates, or franchises six eating establishments specializing in Southern style barbecue which are located as follows:[3] 1) Piggie Park No. 1, 1601 Charleston Highway, also being designated as U. S. Highways Nos. 21, 176 and 321 at the intersection of S. C. Highway No. 215, in West Columbia, South Carolina; 2) Piggie Park No. 2 on the Sumter Highway, also being designated as U. S. Highways Nos. 76 and 378 in Columbia, South Carolina; 3) Piggie Park No. 3 on the Camden Highway, also being designated as U. S. Highway No. 1, in Columbia, S. C.; 4) Piggie Park No. 4 on Broad Street Extension, which is also designated as U. S. Highways Nos. 76, 378 and 521 in Sumter, South Carolina; 5) Piggie

[3] The official South Carolina State Highway Department Primary System Map for 1965-66 has been used in determining the United States and State Highway designations.

Park No. 6 on Highway No. 291 By-Pass North, which connects U. S. Highways Nos. 25, 29, and Interstate Highways Nos. 85 and 385 in Greenville, South Carolina; and 6) Piggie Park No. 7, also known as "Little Joe's Sandwich Shop," at 1430 Main Street in Columbia, South Carolina. All of Piggie Park's eating places are of the drive-in type with the exception of Piggie Park No. 7 also known as "Little Joe's Sandwich Shop" in downtown Columbia. In order to be served at one of the drive-ins a customer drives upon the premises in his automobile and places his order through an intercom located on the teletray immediately adjacent to and left of his parked position. After pushing a button located on the teletray his order is taken by an employee inside the building who is generally out of sight of the customer. When the order is prepared a curb girl then delivers the food or beverage to the customers' car and collects for same. This is generally the only contact which any of defendant's employees has with any customer unless additional service is desired. The orders are served in disposable paper plates and cups, and may be consumed by the customer in his automobile on the premises or after he drives away, solely at his option. There are no tables and chairs, or counters, bars or stools at any of the drive-ins sufficient to accommodate any appreciable number of patrons. The service is geared to service in the customers' cars. Piggie Park claims the distinction of operating the first drive-in specializing in barbecue although it sells other types of short orders. The barbecue meat and hash comprising a substantial majority of its sales are sold in bulk by the pound or the quart, as well as in individual orders. Customers are encouraged to consume the food off the premises by its service in disposable

containers, with no chinaware or silver eating utensils being used. At the five drive-ins the carry-out business for off-the-premises consumption averages fifty percent during the year, depending upon the season and the weather.[4]

3. Piggie Park No. 7, or "Little Joe's Sandwich Shop", in downtown Columbia is the one exception to the drive-in type operation. Defendant operates this establishment as a cafeteria type sandwich shop offering three-minute service, also specializing in barbecue, with table and chair seating capacity for sixty customers and where the food is primarily consumed on the premises. It is located in the prime shopping area of Columbia's Main Street; ninety percent of its business is between 11:00 a.m. and 2:30 p.m., with the majority of its customers being office workers, clerks and downtown shoppers. Its business hours correspond generally with those of the surrounding retail stores.

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[4] The uncontradicted testimony of defendant Bessinger at pp. 222-223 of Tr. was as follows:

"Q. Mr. Bessinger, with reference to the total volume of your business, do you know how much of your business is carry out, or take away business from your drive-ins?

"A. Yes. Of course, as I said, we try to encourage this to the maximum degree. This would average 50%. Carry out would average 50%. I say average, because in the real cold temperature it would jump up to eighty to ninety percent; in the real hot temperature it would also jump up to eighty to ninety percent. So it will have an overall percentage of my business that I know for a fact is carried back to the office or carried back home or carried on a picnic, what have you.

"Q. Do you in fact have facilities for bulk carrying out?

"A. Yes we sell a lot of barbecue by the pound. We sell a lot of quarts of hash by the quart, and slaw by the quarts, and rice by the quarts. We built up quite a big business on that.

"Q. Carry off?

"A. Oh absolutely, and July 4th we sell several tons of barbecue."

It is noted that plaintiff's counsel did not cross-examine Bessinger to any extent in reference to the above testimony and no evidence was offered to counter or rebut the same.

4. Two of the Negro plaintiffs were denied service by Piggie Park No. 2 on the Sumter Highway in Columbia on August 12, 1964 when they drove upon the premises in their automobile. At first a waitress who came out seeing that they were colored went back into the building without taking their order or saying anything to them. Shortly a man with an order pad came to their car, he also refused to take their order, and gave no reason or excuse for this denial of service, although other white customers were being served there at that time. The fact that Piggie Park at all six of its eating places denies full and equal service to Negroes because of their race is uncontested and completely established by the evidence. The limited Negro customers who are served must place and pick up their orders at the kitchen windows and are not permitted to consume their purchases on the premises. Thus, Negroes because of race are being denied full service and are victims of discrimination at all of Piggie Park's eating establishments.

5. No effort is made by defendant to determine whether a Negro customer who purchases food on a take-out basis is an interstate traveler.

6. Piggie Park displays on each of its establishments one modest sign located generally in the front window advising that it does not serve interstate travelers. In its newspaper advertisements is included a notice in small print at the bottom of the ad advising that "we do not serve interstate travelers".[5] No mention of this practice is included in any of its radio advertisements for business. Although some testimony and business records indicate that

[5] See defendant's Exhibit "G".

defendant has refused to serve a very limited number of interstate travelers in the past, the inescapable conclusion demanded by all of the circumstances before the court is that many interstate travelers do obtain service at all of its locations. Except for the small sign in the window no steps are taken by defendant at "Little Joe's Sandwich Shop" to determine whether or not a customer is an interstate traveler, and at its drive-ins no attempt to determine a customer's travel status is claimed to be made until after his order is prepared and actually delivered to his automobile. If the curb girl who serves the order notices that a customer's car bears an out-of-state license, she is instructed to inquire whether such customer is an interstate traveler or is residing in South Carolina. There is testimony to the effect that if the customer admits that he is an interstate tourist service is denied to him although the food has been especially prepared to his order. No inquiry whatever is ever made of any customers who are riding in an automobile with South Carolina license plates. Inasmuch as all five of defendant's drive-ins are located at most strategic positions upon main and much traveled interstate highways and especially in view of the limited action taken by defendant to determine the travel status of its customers the court can only conclude that defendant does serve interstate travelers at all of its locations.[6]

[6] The only direct evidence adduced by plaintiffs tending to establish service to interstate travelers was the testimony of their witness, Sharon A. Miles, a white woman who entered "Little Joe's Sandwich Shop" on April 2, 1966 and obtained service without any question. Upon cross-examination she admitted that she and her husband who is the Columbia Director for the South Carolina Board of Voter Education Project had resided in this state for one and one-half years. Apparently plaintiffs made no attempt to conduct any surveys at defendant's drive-in establishments to show that customers in out-of-state automobiles were actually being served at any of defendant's locations.

7. Several employees of wholesale food companies which regularly sell foodstuffs and other merchandise to Piggie Park testified that the bulk of the food and related products sold by their firms to defendant was and is obtained by them from producers and suppliers beyond the State of South Carolina as follows:

(a) Greenwood Packing Company, a large supplier of meat products, purchases two-thirds of its merchandise from suppliers outside of South Carolina. They sell primarily pork shoulders, spareribs and Boston Butt (a cut off the shoulder). All hogs are live when purchased by it. They are thereafter slaughtered, cut-up, processed and packed within the State of South Carolina. Its total sales to defendant during the fiscal year 1964-65 was $39,663.91 and $15,148.24 from June 1 through December 12, 1965. Its sales to defendant are made without keeping records to indicate which of its meat is produced or slaughtered in South Carolina as contrasted to that which is purchased by it from out-of-state already processed and ready for sale to defendant.

(b) Dreher Packing Company of Columbia, South Carolina, a wholesale distributor of luncheon meats, pork sausage, beef and ground beef patties regularly sells meat products to defendant. Approximately eighty percent of the meat products sold by it to Piggie Park is acquired from suppliers from outside of South Carolina, and no records are maintained to distinguish the in-state from the out-of-state items. However, all of its meat products is processed in some manner by it within the state before sale and

delivery to defendant. It considers defendant as one of its good customers.

(c) Holly Farms Poultry Industry, which secures eighty-five percent to ninety percent of its chickens from a North Carolina supplier, sells a small quantity of meat each month to defendant.

(d) Piggie Park no longer sells beer at any of its locations, its licenses having expired in June 1965. Prior to that time substantial quantities of beer were purchased from Schafer Distributing Company of Columbia, none of which was brewed in South Carolina. It also purchased beer from Acme Distributing Company, distributors of Pabst Blue Ribbon beer which was shipped into the state from Peoria, Illinois.

(e) Defendant purchases pepsi-cola syrup by the gallon from Pepsi-Cola Bottling Company of Columbia. The ingredients which go into this syrup are shipped into South Carolina from New York, Kentucky and Georgia. During 1965 defendant purchased 1,374 gallons of the syrup at $2.75 per gallon, including tax.

(f) Defendant regularly buys fresh, frozen and canned foods from Pearce-Young-Angel of Columbia, a large wholesaler. With the exception of its eggs all items regularly sold to defendant, including limes, onions, beef patties, cabbage, lettuce, tomatoes, french fried potatoes, bell peppers, shrimp and cheese are produced out of South Carolina. Defendant's purchases from this firm during the fiscal year 1964-65 amounted to $41,255.45, most of which had moved into the state in commerce.

(g) Thomas and Howard Company of Columbia, a large wholesale distributor of food and related products, regularly sells merchandise to defendant such as coca-cola syrup, sugar and salt. Altogether it handles approximately 7,000 items with about sixty percent or more being food items, mostly produced or manufactured in states other than South Carolina. Thus a large quantity and variety of the products purchased by defendant from this company have moved in commerce. Although only about sixty percent of the items purchased from it are foodstuffs the remaining forty percent of the items as herein enumerated are necessary and related to either the preparation of defendant's food for sale or its service of same.

(h) Epes-Fitzgerald Company sells to defendant paper products consisting of cups, plates, napkins, waxed paper, paper bags and boxes. Of these items all are manufactured outside of South Carolina except the paper cups and the paper boxes.

(i) Trusdale Wholesale Meat Company of Columbia sold a substantial quantity of meat products to defendant up until August 1965. Since that time they have made no sales to the defendant. This supplier received less than five percent of its products from outside of South Carolina.

(j) Roddey Packing Company of Columbia also supplies meat products to defendant. Approximately twenty percent of its hogs are purchased live out-of-state and then slaughtered and processed in South Carolina before sale to its customers.

(k) Southeastern Poultry Company of Columbia is another supplier of chickens to defendant. All of its chickens are grown and processed in South Carolina. During 1964 its sales to defendant totalled $6,895.82 and in 1965 totalled $13,757.48.

8. Mrs. Merle Brigman, defendant's bookkeeper and chief buyer of its merchandise, testified that she had made a compilation from defendant's records which she keeps to determine what percentage of food served by defendant was either produced, grown or processed in South Carolina. In arriving at her percentages she did not include as out-of-state foods such items as live hogs and cows purchased out-of-state by their suppliers when slaughtering or any processing were done in the state prior to delivery to defendant. Neither did she include pepsi-cola syrup concentrate purchased from the Pepsi-Cola Bottling Company as an out-of-state product since it was mixed and processed within the state. Not included in her percentages were any of the ancillary or related items purchased by defendant's suppliers from out-of-state such as salt, sugar, paper products, spices, etc. She concluded that twenty-five percent of the "food" purchased by defendant during fiscal years 1963-64 and 1964-65 was "processed and/or manufactured" outside of South Carolina, and seventy-five percent was produced and/or manufactured into "food" within South Carolina. She further testified that eighteen percent of defendant's "food" purchased during the period of June 1, 1965 through December 12, 1965 was "processed and/or manufactured" into "food" out-of-state.[7] Defendant's bookkeeper also testified

[7] See defendant's Exhibit "E", witness's compilation of in-state and out-of-state foods.

that defendant's expenditures for food and related items for fiscal year 1963-64 totaled $240,565.58 and for fiscal year 1964-65 totaled $222,845.25. Its expenditures for May 31, 1965 through December 12, 1965 were $122,724.13.

Considering defendant's admission that from eighteen percent to twenty-five percent of its "food" in a finished and ready-for-use form for the years 1963 through 1965 moved in commerce into the state from another state; also the large quantities of live cattle, hogs and chickens purchased by defendant's suppliers from outside of the State and slaughtered and processed within the State before delivery to defendant, which were not included by defendant in its out-of-state percentages, along with other foodstuffs purchased by it which were shipped into the State and processed herein, together with such related items as sugar, salt, pepper, spices and sauces which admittedly moved in commerce, it is obvious that considerably more than twenty-five percent of the total food products served by defendant came from outside of the State. The court is persuaded and therefore finds that at least forty percent of the food served by defendant during the years in question "moved in commerce".

CONCLUSIONS OF LAW

By Section 2000a(c) Congress has determined that an establishment described in paragraph (2) of Subsection (b) of Section 2000a affects commerce within the meaning of the public accommodations subchapter of the Act if "it serves or offers to serve interstate travelers or a substantial portion of the food which it serves * * *, has moved in commerce". As was stated by the Three-Judge

Court in Willis v. Pickrick Restaurant, 231 F.Supp. 396 at page 399 (N.D. Ga. 1964):

> "[T]he application of the Civil Rights Act to these defendants depends upon the resolution of issues of fact, for a restaurant is not brought within the definition of interstate commerce unless it meets one of the tests enumerated in subparagraph (c) of Section 201. *These tests are in the alternative.* Either it must serve or offer to serve interstate travelers, *or* a substantial portion of the food which it serves or other products which it sells must have moved in interstate commerce." (Emphasis added.)

Moreover, the Supreme Court in *McClung,* supra, in upholding the constitutionality of the public accommodations section of the Act indicated that Congress has made sufficient findings of discrimination to be conclusive and acted within its constitutional right granted by the Commerce Clause of the United States Constitution. Thus it is not necessary in this or any other individual case to determine that defendant's acts in actuality affect commerce in and of itself; but it is necessary to determine whether defendant in the operation of its eating establishments serves a substantial portion of food which has moved in interstate commerce, *or* whether it serves or offers to serve interstate travelers. If it is determined that defendant's establishments meet either of these tests in the alternative, then under the Act they affect commerce.

Has a substantial portion of the food which defendant serves in its six eating establishments moved in interstate commerce? In line with the factual determinations

hereinabove arrived at the answer is yes. Although the Act does not specifically define "substantial" the court construes it in the light of its usual and customary meaning: That is, something of real worth and importance; of considerable value; valuable; something worthwhile as distinguished from something without value or merely nominal.[8]

Under defendant's own admission that twenty-five percent of the foods it served in the years 1963-64 and 1964-65 and eighteen percent for the first six months of fiscal 1965-66 moved in commerce, the court has no hesitancy in concluding as a matter of fact and law that a "substantial" portion of the food which it serves has moved in interstate commerce.

Neither can the court agree with defendant's contention that all foodstuffs, including hogs, beef and chickens, together with other related items, which are slaughtered or processed within the State after having been shipped in from another state, should be considered as in-state goods which have not moved in commerce on the basis that they came to rest in this state and thereby became intrastate in character. Such contention was overruled by *McClung*, supra, 379 U.S. at page 302, 85 S.Ct. at page 383 where the Court stated:

> "Nor are the cases holding that interstate commerce ends when goods come to rest in the State of destination apposite here. That line of cases has been applied with reference to state taxation or regulation but not in the field of federal regulation."

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[8] Definition of "substantial" contained in Black's Law Dictionary, Fourth Edition, 1951.

From the foregoing this court has a mandate from the Supreme Court to conclude that all products sold to defendant as food by its producers which have moved in interstate commerce into this state in some form, even though they may have been slaughtered or otherwise processed after arrival here, are to be considered as food which has moved in commerce, as that phrase is used in Section 2000a(c) (2) of the Act. Therefore, by including all foodstuffs served by the defendant during the periods under consideration which have moved in interstate commerce the court has concluded that at least forty percent of the same has moved in commerce and unquestionably constitutes a "substantial" portion of the total food which it serves in all of its six locations.

Does the defendant serve or offer to serve interstate travelers? As hereinabove pointed out, the direct evidence produced by plaintiffs that defendant serves or offers to serve interstate travelers is slight, unimpressive and inconclusive; however, from all the circumstances before the court there is no doubt but that defendant has served and is serving interstate travelers. This is apparent from the testimony of a witness who testified that upon presenting herself for service at "Little Joe's Sandwich Shop" no inquiry whatever was made as to her place of residence. Probably of more import is the fact that all five of defendant's drive-ins are located upon much traveled interstate and federal highways with large signs at and about each location advertising its products. Defendant also advertises for business in daily newspapers and over the radio. Moreover, it employs no reasonably effective means of determining whether its customers are inter-

or intra-state travelers. The court, therefore, concludes that defendant serves or offers to serve interstate travelers at all of its locations.

Having concluded that all of defendant's establishments "affect commerce" within the provisions of Section 2000a (c) (2) of the Act, the third and last question for determination arises from the construction to be given to subsection (b) (2) of said section of the Act which provides that "any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility *principally engaged in selling food for consumption on the premises*" [emphasis added] is a place of public accommodation within the meaning of the Act.

Do defendants' drive-ins and sandwich shop come within the ambit of the Act as intended by Congress? The court has no difficulty in deciding that "Little Joe's Sandwich Shop" is within the coverage of the Act. It comes within the usual and customary definition of a restaurant, lunchroom, lunch counter, or other eating establishment mainly engaged in serving food for on-the-premises consumption. It caters to walk-in customers who are furnished tables and chairs, including a balcony, where they may, and generally do, sit down and consume their orders within the building. Its facilities, operation, and clientele are entirely different to those of the five drive-ins, which have no such accommodations for diners to walk into buildings to be served and to eat inside. They cater entirely to motorized customers who do not alight from their automobiles to order or eat, whose orders are served in disposable containers, and fifty percent of all foods served to them is consumed off the premises.

By limiting the scope of places of public accommodation to restaurants, cafeterias, lunchrooms, soda fountains, and other facilities principally engaged in serving food for consumption on the premises, it is only reasonable to assume that Congress did not intend to include within coverage of the Act such eating places as defendant's drive-ins, which do not in the main provide its patrons with facilities to be seated so that their orders may be and generally are eaten on the premises. None of the reported cases dealing with eating houses has considered this aspect of the Act. Both *McClung* and *Pickrick Restaurant,* supra, involved conventional type restaurants which served their customers while seated at tables and who consumed the food entirely on the premises. Surely if Congress had intended to include within the public accommodations provisions of the Act all public eating establishments which it determined "affect commerce" if they meet either of the alternate tests of Section 2000(a) (◆ (2), then its including in Subsection (b) (2) of said Section the phrase "or other facility principally engaged in selling food for consumption on the premises" would be totally futile and meaningless. Our review of the Act's legislative history, committee reports, and congressional debates has failed to indicate a contrary motivation. The court must assume from its verbiage that Congress intended to limit the coverage of the Act to those eating places primarily engaged in serving food for on-the-premises consumption.[9]

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[9] Whether "principally engaged in the sale of food for consumption on the premises" qualifies "any restaurant, cafeteria, lunchroom, lunch counter, soda fountain" or only "other facility" has opposing persuasions.

Indeed this court has no motive, intent or purpose to extend by judicial fiat any of the provisions of the Civil Rights Act of 1964 beyond the scope clearly enunciated and adopted by Congress.

Although it has been stated that the term restaurant has no definite legal meaning unless defined by statute, Congress was well aware that an eating place or a restaurant in the generally accepted sense is defined as follows: "A public place where food is sold casual guests to be eaten upon the premises; a house where cooked provisions are sold, to be eaten on the premises; a house where food is sold to customers; a place of resort for meals". 28 C.J.S. pp. 825-826. In State v. Shoaf, 179 N.C. 744, 102 S.E. 705, 9 A.L.R. 426 (1920), the Supreme Court of North Carolina in applying a Sunday law stated:

> "The terms 'restaurant' and 'cafe,' in common parlance * * * are substantially synonymous. A restaurant is generally understood to be a place where refreshments, food, and drink are served * * * While

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The House Report of the Committee on the Judiciary, 2 U.S. Cong. & Admin. News 1964, pp. 2391, 2395 reads as follows:

> "*Section 201(b)* defines certain establishments to be places of public accommodation if their operations affect commerce * * * These establishments are * * * (2) restaurants, lunch counters, *and similar establishments,* including those located in a retail store; and gasoline stations." (Emphasis added.) By this statement the inference could be drawn that the disjunctive "or" in Section 201(b), as enacted, limited the qualifying phrase to "other facility". In other words, "or other facility principally engaged in selling food for consumption on the premises" means only "and similar establishments". The court, however, is persuaded in that "other" as used in its primary sense of "one of two or more" requires the qualifying phrase to be read with "any restaurant, cafeteria, lunchroom, lunch counter, soda fountain" or at least required to be used to define "restaurant, lunchroom, lunch counter, soda fountain."

> the word 'restaurant' has no strictly defined meaning, it seems to be used indiscriminately as a name for all places where refreshments can be had, from a mere eating house and cookshop to any other place where *eatables are furnished to be consumed on the premises.*" (Emphasis added.) See also the annotation in 122 A.L.R. page 1399.

Even if defendant's drive-ins were found to be restaurants or eating places within the popular and usual definition, they should not be considered as facilities "principally engaged in selling food for consumption on the premises". The adverb "principally" is defined as "primarily; chiefly, mainly, in the principal manner, in the chief place or degree". Webster's International Dictionary, Second Edition. Under the plain meaning of the phrase one who serves fifty percent or less of its food which is taken away and eaten off the premises cannot be held to be *principally* engaged in selling food for consumption on the premises. The uncontradicted evidence before the court is that only fifty percent of the food served at defendant's drive-ins is consumed off the premises, and all of its patrons are encouraged to take their orders elsewhere for consumption.

The court therefore concludes that defendant's five drive-in establishments are not principally engaged in serving food for on the premises consumption, and are not places of public accommodation within the meaning and purview of the Civil Rights Act of 1964; thus, plaintiffs are not entitled to the demanded relief as to them. On the other hand it is concluded that "Little Joe's Sandwich Shop" is principally engaged in selling food for consumption on the premises, and is therefore a place of public accommo-

dation with the Act. As to it, plaintiffs have established their right to the requested relief. It is, therefore,

Ordered that an injunction will issue in the following terms:

(a) The defendants, Piggie Park Enterprises, Inc., and L. Maurice Bessinger, their agents, employees, successors, and all persons acting in concert with them, and at their direction, are enjoined from refusing to admit Negroes to the premises of Piggie Park No. 7, also known as "Little Joe's Sandwich Shop", located at 1430 Main Street, Columbia, South Carolina, upon the same basis and upon the same conditions that non-Negro members of the general public are admitted to said establishment;

(b) They ars also enjoined from failing or refusing to sell food, meals, or other merchandise and to provide services, facilities, privileges, advantages and accommodations to Negro patrons at said establishment upon the same basis and upon the same conditions that they are made available to patrons and customers of other races.

In order that the defendants may have an opportunity to appeal, and if they so desire to seek a stay of this order until such appeal is consummated, it is ordered that the foregoing injunction shall become effective thirty days from the date hereof; to wit, on the 27th day of August, 1966. Court costs exclusive of attorneys' fees are hereby awarded to plaintiffs. Let judgment be entered accordingly.

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APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1967

No. 339

ANNE P. NEWMAN, SHARON W. NEAL and JOHN MUNGIN,

Petitioners,

—v.—

PIGGIE PARK ENTERPRISES, INC., a corporation and L. MAURICE BESSINGER.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED JULY 8, 1967
CERTIORARI GRANTED OCTOBER 9, 1967.

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Docket Entries

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Answer	Filed: February 5, 1965
First Amended Answer	Filed: August 23, 1965
Motion to Amend	Filed: March 19, 1966
Affidavit in Support of Motion To Amend	Filed: March 19, 1966
Second Amended Answer	Filed: March 30, 1966
Trial Held	April 4, 5, 1966
Opinion and Judgment in District Court	Filed: July 27, 1966
Notice of Appeal	Filed: August 9, 1966
Opinion and Judgment in Court of Appeals	Filed: April 24, 1967

IN THE

United States Court of Appeals

FOR THE EASTERN DISTRICT OF SOUTH CAROLINA

COLUMBIA DIVISION

Civil Action No. AC-1605

ANNE P. NEWMAN, SHARON W. NEAL
and JOHN MUNGIN,

Plaintiffs,

—VS.—

PIGGIE PARK ENTERPRISES, INC., a Corporation
and L. MAURICE BESSINGER,

Defendants.

Complaint

(Filed: December 18, 1964)

1.

The jurisdiction of this Court is invoked pursuant to Title 28 U. S. C., Section 1343(3) and Section 1343(4). This is a suit in equity authorized by and instituted pursuant to Title 2 of the Act known as the "Civil Rights Act of 1964", —— Stat. ——, and Title 42 U. S. C., Section 1983. The jurisdiction of this Court is invoked to secure protection of civil rights and to redress deprivation of rights, privileges, and immunities, secured by (a) the Fourteenth Amendment to the Constitution of the United States, Section 1; (b) the Commerce Clause, Article 1, Section 8,

Clause 3, of the Constitution of the United States; (c) Title 2, of the Act known as the "Civil Rights Act of 1964", —— Stat. ——, providing for injunctive relief against discrimination in places of public accommodations; and (d) Title 42 U. S. C., Section 1981, providing for the equal rights of citizens and all persons within the jurisdiction of the United States.

2.

Plaintiffs bring this action in their own behalf and of others similarly situated pursuant to Rule 23(a)(3) of the Federal Rules of Civil Procedure. There are common questions of law and fact affecting the rights of Negro persons to use the goods, services, facilities, privileges, advantages and accommodations of the Piggie Park Restaurants, owned and operated by the defendants herein, without discrimination or segregation on the ground of race or color. The persons constituting the class are so numerous as to make it impracticable to bring them all before this Court. A common relief is sought. The interests of said class are adequately represented by plaintiffs.

3.

This is a proceeding for a temporary and permanent injunction restraining defendants from continuing or maintaining any policy, practice, custom and usage of withholding, denying, attempting to withhold or deny, or depriving or attempting to deprive, or of otherwise interfering with the rights of plaintiffs and others similarly situated to admission to and full use and enjoyment of the goods,

services, facilities, privileges, advantages and accommodations of the Piggie Park Restaurants owned and operated by the defendants herein without discrimination or segregation on the ground of race or color.

4.

Plaintiffs are Negro citizens of the United States and of the State of South Carolina, residing in the City of Columbia and are classified as Negroes under the laws of the State of South Carolina.

5.

Defendant Piggie Park Enterprises, Inc. is a corporation duly organized and chartered under the laws of the State of South Carolina. Said defendant owns and/or operates several restaurants in various communities in the State of South Carolina, two or more of which are located in the City of Columbia. Defendant L. Maurice Bessinger is the President of said corporation and is general manager of the various restaurants operated by the corporate defendant. In said restaurants, defendants serve and offer to serve interstate travelers and defendants' operations affect travel, trade, traffic, commerce, transportation or communication among, between and through the several states, the District of Columbia or foreign countries, territories and possessions. A substantial portion of the goods which defendants serve in said restaurants move in commerce.

6.

Each of the above named plaintiffs has been denied service at one or more of the restaurants operated by the defendants.

A. On or about July 3, 1964, plaintiff John Mungin entered one of the restaurants operated by defendants at No. 1430 Main Street in the City of Columbia, South Carolina and attempted to purchase food. Plaintiff was not served and was required to leave the premises solely because of his race and color.

B. On or about August 12, 1964, plaintiffs Anne P. Newman and Sharon W. Neal attempted to purchase food at two of the drive-in restaurants operated by defendants in or near Columbia, South Carolina. Plaintiffs were told that they could purchase food at said restaurants but that they could not consume the food on the premises.

7.

Plaintiffs were denied and deprived service in restaurants owned and operated by defendants herein because of the defendants' well established and maintained policy, practice, custom and usage of discriminating against Negroes and of denying them service in said restaurants in violation of plaintiffs' rights to the full and equal enjoyment of the goods, services, facilities, privileges, advantages and accommodations of places of public accommodation without discrimination of segregation on the ground of race or color as secured by (a) the Fourteenth Amendment to the Constitution of the United States; (b) the Commerce Clause, Article 1, Section 8, Clause 3, of the Con-

stitution of the United States; (c) Title 2, of the Act known as the "Civil Rights Act of 1964", —— Stat. ——, providing for injunctive relief against discrimination in places of public accommodation; and (d) Title 42 U. S. C., Section 1981.

8.

Plaintiffs allege that the racially discriminatory practices of the defendants are in continuance of a long established, maintained and well publicized policy of the defendants in the operation of said restaurants and of the avowed purpose of said defendants to continue said policy. The State of South Carolina has no State law and the City of Columbia has no local law prohibiting the racially discriminatory practices described above and establishing or authorizing the State or Local authority to grant or seek the relief prayed herein. Plaintiffs have no plain, adequate or complete remedy at law to redress these wrongs and this suit for injunction is the only means of securing adequate relief. Plaintiffs are now suffering and will continue to suffer irreparable injury from defendants' policy, practice, custom and usage as set forth herein.

9.

On account of the above mentioned unlawful acts of the defendants and on account of the maintenance of said policy, practice, custom and usage in violation of the constitution and laws of the United States as aforesaid, plaintiffs have employed attorneys and have been forced to file this action and have incurred expenses and have become obligated to pay counsel fees on account of the filing of this action.

WHEREFORE, plaintiffs respectfully pray that upon the filing of this complaint, as may be proper and convenient to the Court, the Court advance this cause on the docket and order a speedy hearing of said action and upon said hearing:

(a) That the Court issue a preliminary injunction, enjoining defendants, their agents, employees, successors and all persons acting in concert with them and at their direction from continuing or maintaining any policy, practice, custom or usage of denying, abridging, withholding, conditioning, limiting or otherwise interfering with plaintiffs and other persons similarly situated in the admission, usage, and enjoyment of the goods, services, facilities, privileges, advantages and accommodations of the restaurants owned and operated by defendants and any other restaurants owned and operated by the defendants on the ground of race or color as contrary to the Fourteenth Amendment to the United States Constitution, the Commerce Clause, Article 1, Section 8, Clause 3, of the United States Constitution, Title 2, —— Stat. —— of the Act known as the "Civil Rights Act of 1964" and Title 42 U. S. C., Section 1981.

(b) That the Court enter a permanent injunction, enjoining defendants, their agents, employees, successors and all persons acting in concert with them and at their direction from continuing or maintaining any policy, practice, custom or usage of denying, abridging, withholding, conditioning, limiting or otherwise interfering with plaintiffs and other persons similarly situated in the admission, use and enjoyment of the goods, services, facilities, privi-

leges, advantages and accommodations of the Piggie Park Restaurants and any other restaurants owned and operated by the defendants on the ground of race or color as contrary to the Fourteenth Amendment to the United States Constitution, the Commerce Clause, Article 1, Section 8, Clause 3, of the United States Constitution, Title 2, —— Stat. —— of the Act known as the "Civil Rights Act of 1964" and Title 42, U. S. C., Section 1981.

(c) Allow plaintiffs their costs herein including reasonable attorney fees for plaintiffs' attorneys and for such other and additional relief as may appear to the Court to be equitable and just.

Answer

(Filed: February 5, 1965)

1.

Defendant Piggie Park Enterprises, Inc. is a Corporation duly organized and chartered under the laws of the State of South Carolina; and owns and/or operates and/or franchises several restaurants in various communities in the said State. Said Defendant is not engaged in interstate commerce and operates under an announced policy of not catering to interstate travelers. Said Defendant has been denied Federal trade mark protection on the ground that it is not in interstate commerce, and is discharged from the responsibility of paying Federal minimum wages on the same ground.

2.

Defendant Bessinger believes as a matter of faith that racial intermixing or any contribution thereto contravenes the will of God. As applied to this Defendant, the instant action and the Act under which it is brought constitute State inference with the free practice of his religion which interference violates The First Amendment of the United State's Constitution.

3.

The so called "Civil Rights Act of 1964" under which this action is brought violates XIVth Amendment in that it seeks to deny Defendants equal protection of the law, seeks to deny them the full enjoyment and use of their property without due process, and seeks to abridge their privileges

and immunities as citizens, in which instance it violates also Article IV, Section 2 of the United States Constitution. The said Act exceeds the power of Congress to regulate interstate commerce and thus is violative of the commerce clause in Article I, Section 8, of the United States Constitution.

The Constitutional questions above are not precluded by prior decisions because of errors on the exercise of judicial power therein violative of the basic rights of all citizens as generally guaranteed by the United States Constitution.

4.

The existence, inviolate, of the United States Constitution, itself, and the form of law it guarantees are together the most basic rights enjoyed by citizens of the United States.

5.

Defendants deny Plaintiffs allegation that they were "forced to file this action".

6.

Defendants deny Plaintiffs allegation that they suffered and will continue to suffer from Defendants policy, practice, custom and usage, as set forth in the Complaint herein and demand strict proof thereof.

7.

Defendant Bessinger is an agent of Defendant Piggie Park Enterprises, Inc., with a duty to enforce the policies

of said Corporate Defendant, but as said agent has no individual responsibility for the making of the policies.

WHEREFORE, Defendants respectfully pray that the Court will dismiss the alleged cause of action against them, individually and/or severally.

5 February 1965

First Amended Answer

(Filed: August 23, 1965)

1.

Defendant Piggie Park Enterprises, Inc. is a Corporation duly organized and chartered under the laws of the State of South Carolina; and owns and/or operates and/or franchises several restaurants in various communities within the said State. Said Defendant denies that it is engaged in interstate commerce, and asserts that it operates under an announced policy of not catering to interstate travelers. Said Defendant has been denied Federal trademark protection on the ground that it is not in interstate commerce, and has been discharged from the responsibility of paying Federal minimum wages on the same ground.

2.

Defendant Bessinger believes as a matter of faith that racial intermixing, or any contribution thereto, contravenes the will of God. As applied to this Defendant, therefore, the instant action and the Act under which it is brought constitute State interference with the free practice of religion which is violative of the United States Constitution (U.S. Const. Amend. Art I).

3.

The "'Civil Rights' Act of 1964" is generally violative of the United States Constitution, and specifically so in that it: (1) denies the Defendants the equal protection of the laws (US Const, Amend Art XIV, Sec 1; US Const Art IV,

Sec. 1); (2) denies Defendants the full use and enjoyment of their property by taking a substantial portion thereof for alleged public use and benefit without due process and without just compensation (US Const, Amend Art XIV, Sec 1); (3) abridges Defendants privileges and immunities (US Const, Art IV, Sec. 2); and (4) exceeds the Congressional power to regulate interstate commerce (US Const, Art I, Sec. 8).

Defendants urge that these questions are not precluded by prior decisions due to errors in the exercise of the judicial power therein violative of the basic rights as generally secured by the United States Constitution. The Defendants would further insist that certain of these questions are unique.

4.

The existence, inviolate, of the United States Constitution, itself, and the form of law it guarantees are together the most basic rights enjoyed by citizens of the United States of America (US Const, Amend Art IX; US Const, Amend Art X).

5.

Defendants deny the allegation that Plaintiffs were "forced to file this action."

6.

Defendants deny the allegation that Plaintiffs suffered and will continue to suffer from Defendants policy, practice, custom and usage, as set forth in the Complaint, and demand strict proof thereof.

First Amended Answer

7.

Defendant Bessinger is an agent of Defendant Piggie Park Enterprises, Inc., with a duty to enforce the policies of said Corporated Defendant, and has no individual responsibility for the making of the said policies.

WHEREFORE, Defendants respectfully pray the Court to dismiss the alleged cause of action against them jointly and/or severally.

23, August 1965

Motion to Amend

(Filed: March 19, 1966)

The Defendant moves the Court as follows:

1. To allow the Defendants to amend their Answer in the above-entitled matter and to incorporate therein allegations of denial that were overlooked heretofore in the pleadings filed on behalf of the said Defendants; that said amendments are set forth in a proposed Answer hereunto appended as Exhibit A; that the reasons that said Amended Answer is necessary are set forth in the Affidavit of counsel hereunto appended as Exhibit B.

2. That this Motion is based upon the provisions of Rule 15, Sub-Section (a), Federal Rules of Civil Procedure and said Motion is made in the interest of justice in that counsel has heretofore failed to properly deny certain matters in the Complaint, which matters should have been denied and that certain other defenses available to the Defendants have not been adequately set forth in the pleadings; that this Motion is further based upon an Order of this honorable Court heretofore filed on February 24th, 1966.

3. That should this Motion be allowed, the Defendants in this matter will be ready for trial on April 4th, 1966, and that the granting of this Motion will not effect a delay in the trial of this case.

4. That the Defendants herein further move the Court to allow the Defendants herein to correct the answers given in Interrogatories 10 and 11 for the reason that

proper inquiry was not made by previous counsel as to the information requested by the Plaintiffs in said Interrogatories; that the substance of this Motion is that this matter was not heretofore adequately prepared and Defendants should be fully allowed their day in Court.

Affidavit in Support of Motion to Amend

(Filed: March 19, 1966)

SAMUEL B. RAY, JR., being duly sworn deposes and states:

That he is attorney for the Defendants herein; that he was retained after an Order of this Court relieving counsel, and that he entered this case as of March 7, 1966.

That after carefully reviewing the pleadings heretofore filed on behalf of the Defendants and after reviewing the facts as well as pertinent statutes and court decisions relative to the instant action, the undersigned is of the opinion that the pleadings filed on behalf of the Defendants are wholly inadequate to fairly and fully present the defenses available to the Defendants.

That pursuant to the provisions of Rule 15, subsection (a), Federal Rules of Civil Procedure, in the interests of justice, counsel urges the Court to permit Defendants to file an amended Answer setting forth such defenses as may be available and to place the Defendants in such a position as may allow them to remain in Court until all pertinent evidence may be heard.

That counsel hereby agrees to be ready for trial on April 4th, 1966, as heretofore set by this Court even though an amendment is allowed, and that this Affidavit is purely in the interest of justice to the Defendants and not for the purpose of delay in the determination of this action.

WHEREFORE, counsel prays that the Defendants be granted leave of this Court to amend their Answer and an Amended Answer heretofore filed herein upon such conditions as the Court may deem equitable.

Second Amended Answer

(Filed: March 30, 1966)

For a First Defense

The Defendants admit the jurisdiction of this Court under the provisions of Title 2 of the Act known as the "Civil Rights Act of 1964," and Defendants deny the remaining allegations of Paragraph One of the Complaint; Defendants allege that they are without knowledge or information sufficient to form a belief as to the truth contained in Paragraphs Two and Four of the Complaint; Defendants admit so much of Paragraph Five thereof as alleges "Defendant Piggie Park Enterprises, Inc. is a corporation duly organized and chartered under the laws of the State of South Carolina. Said defendant owns and/or operates several restaurants in various communities in the State of South Carolina, two or more of which are located in the City of Columbia. Defendant L. Maurice Bessinger is the President of said corporation and is general manager of the various restaurants operated by the corporate defendant"; Defendants deny each and every other allegation contained in said Complaint.

For a Second Defense

The Defendants allege that they are not engaged in interstate commerce, nor does their operation affect commerce within the meaning and definition of Title 2 of the Act known as the "Civil Rights Act of 1964"; Defendants further allege that they are not within Federal control or regulation under the Commerce Clause, Article 1, Section 8, Clause 3 of the Constitution of the United States, that

in this connection, the Defendants have been denied Federal trademark protection on the ground that Defendants are not in interstate commerce, and Defendants have been discharged from the responsibility of paying Federal minimum wages upon the same ground.

For a Third Defense

The Defendants allege that Piggie Park Enterprises, Inc., is not a place of public accommodation under Title 2 of the Act known as the "Civil Rights Act of 1964" providing for injunctive relief against discrimination in places of public accommodation, in that (a) the Defendants' operation and business does not affect commerce, nor (b) does a substantial portion of the food which it serves or other products which it sells move in commerce, nor (c) do Defendants serve or offer to serve interstate travelers, nor (d) are the Defendants herein in commerce within the meaning and purview of Title 2 of the "Civil Rights Act of 1964"; the Defendants further allege that for the Defendants to be found affecting commerce it would be necessary to find that the Plaintiffs herein and others similarly situated would go without food as a result of a failure of the Defendants to serve or provide food for said Plaintiffs.

For a Fourth Defense

1. That Title 2 of the Act known as the "Civil Rights Act of 1964" violates the Defendants' rights under the Constitution of the United States in that (1) denies the Defendants the equal protection of the laws under Amendment Article 14, Section 1, thereof and under Article 4, Section 1,

thereof; (2) denies the Defendants the full use and enjoyment of their property by taking a substantial portion thereof for public use and benefit without due process of law and without just compensation under Amendment Article 14, Section 1, thereof; (3) abridges Defendants' privleges and immunities under Article 4, Section 2; and (4) exceeds Congressional power to regulate interstate commerce under Article 1, Section 8, thereof.

2. The Constitutional question herein is not precluded by prior decisions because of errors in the exercise of power of judicial power therein violative of the basic rights of all citizens guaranteed by the Constitution of the United States, that as to the Defendants in this action the Constitutional questions raised are unique.

For a Fifth Defense

1. That Title 2 of the "Civil Rights Act of 1964" under which this action is brought violates the Defendants' rights under the 13th Amendment of the Constitution of the United States and would impose a type of slavery or involuntary servitude upon the Defendants, their servants, agents or employees, in violation of their rights under said Amendment.

2. The Constitutional question herein is not precluded by prior decisions because of errors in the exercise of power of judicial power therein violative of the basic rights of all citizens guaranteed by the Constitution of the United States, that as to the Defendants in this action the Constitutional questions raised are unique.

Second Amended Answer

For a Sixth Defense

That the Title 2 of the "Civil Rights Act of 1964" under which this action is brought violates the Defendants' rights under the 1st Amendment to the Constitution of the United States in that Defendant Bessinger believes as a matter of religious faith that racial intermixing or any contribution thereto contravenes the will of God; that as applied to this Defendant, the instant action and the Act under which it is brought constitutes Congressional interference with the prohibition against interference of the free exercise of the Defendant's religion.

WHEREFORE, Defendants respectfully pray the Court to dismiss the alleged cause of action against them jointly and/or severally.

March 18, 1966

Transcript of Trial, April 4, 5, 1966

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The Court: All right, gentlemen, calling for trial AC-1605, Anne P. Newman et al, vs. Piggie Park Enterprises, Inc., et al as Defendants. Mr. Perry representing the Plaintiffs, are you ready?

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Mr. Perry: Plaintiff is ready.

The Court: Mr. Ray, what about Defendants?

Mr. Ray: We are ready, if your Honor please, before the trial commences one little thing—in drafting the pleadings, and I discussed this with Mr. Perry we alleged the denial of equal protection under law and denial of due process under the Fourteenth Amendment of the Constitution, which should have read the Fifth Amendment of the Constitution. If we could make that change, I'd appreciate it, sir.

The Court: Is that in your Amended Answer?

Mr. Ray: Yes, sir. It was in my Amended Answer.

The Court: What part?

Mr. Ray: The Fourth Defense, it has to do with the due process and equal protection, should have been the Fifth Amendment instead of the Fourteenth Amendment. Mr. Perry said that he had no objection.

The Court: Is that in the first or second paragraph?

Mr. Ray: It is in the first paragraph, sir, of the Fourth Defense.

The Court: What line?

Mr. Ray: It would be the 3rd line, 4th line, and 5th line. They all pertain to the same thing there.

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The Court: Where you have the Fourteenth Amendment, you want to amend that to the Fifth Amendment?

Mr. Ray: Yes, sir, and both instances there where I have the Fourteenth, it should have been the Fifth Amendment.

The Court: Any objection to that, Mr. Perry?

Mr. Perry: No objection, your Honor.

The Court: All right. The Fourth Defense in the Answer will be amended accordingly. All right, gentlemen, let's proceed.

Mr. Perry: What is his Honor's pleasure with reference to the reading of the Pleadings?

The Court: Well I don't care to have them read. If you wish to make a brief statement, brief opening statement, I will be glad to hear from you, and I will be glad to hear what your position is; then I will give defense counsel a like opportunity before we get into the testimony.

Mr. Perry: Thank you, your Honor. Well, of course, your Honor I am sure is familiar with the pleadings, and the issues therein framed in this case. The Plaintiffs allege that on the dates alleged in the Complaint the Plaintiffs, all of whom are Negroes, sought service at one or more of the establishments operated by the defendants,

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and they were refused such service because they are Negroes. Action here is bought for an injunction prohibiting such discriminatory operation of the defendants' businesses under Title II of the Civil Rights Law of 1964; and essentially, that is our position. The plaintiffs also are seeking their costs in this proceeding, including reasonable fees for their attorneys.

The Court: Is it your position that the defendants are in violation of Title II of the Civil Rights Act of 1964?

Mr. Perry: That is our position, your Honor.

The Court: Very well.

Mr. Ray: If your Honor please, we submit that the defendants, and by our Answer, that they are not in violation of Title II of the Civil Rights Act of 1964. In addition, and jurisdictionally, the plaintiff had alleged several other Federal Statutes for jurisdiction, we don't see they are pertinent and the matter strictly arises from Title II of the Civil Rights Act, more particularly Sections 201 and the following sections in the Public Accommodations Section. We deny that we principally are engaged in selling food for consumption on the premises. We deny that we sell a substantial amount of food that is moved in

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commerce within the meaning of the Act, and we raise a Constitutional question concerning due process of law insofar as the proposed Act would take property of the defendants without due process, as well as the Act is arbitrary, vague, indefinite and capricious insofar as this defendant, and others similarly situated under Section 201 b(2), and (c)—

The Court: Hadn't that question already been decided by the United States Supreme Court?

Mr. Ray: No, sir.

The Court: How about the Heart-of-Atlanta Motel case?

Mr. Ray: Pertaining to this, no, sir. That was a motel and serving transients. We deny we are serving, or offer to serve interstate travelers. We cut out that portion.

The Court: You deny that Piggie Park deals in interstate terminals?

Mr. Ray: Yes, sir. We have evidence on that, if your Honor please.

The Court: Well, of course, I am going to give you an opportunity, but I am a little surprised that you deny that.

Mr. Ray: Yes, sir, we do, if your Honor please.

The Court: All right.

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Mr. Ray: And that we do not come within the meaning of the Act. Of course, I have stepped on to the fact that the Act itself denies the defendant due process, and that it is vague, arbitrary, and capricious insofar as the people that come under it, and don't come under it. It is conceivable after the only decision that has come down, and established law, that certain restaurants or places that are attempted to be covered could come without the Act, and there is no standard by which a man could go about setting up or determining when he comes under the Act, and when he doesn't come under the Act, but it would depend, of course, upon the judicial decision in any one of the Fifty District Courts of the land, on any given date, and we claim there is a denial of due process of law because of the arbitrariness and precedent for striking down statutes that are so arbitrary in all of the decisions along the due process line. Our further position is that it imposed servitudes upon the defendants in violation of the Thirteenth Amendment, and finally that it is an imposition upon the freedom of the expression of religion of Mr. Bessinger, as a citizen.

Sharon Neal—for Plaintiffs—Direct

Mr. Perry: Shall we proceed with the presentation of our evidence, your Honor?

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The Court: Yes, sir.

Mr. Perry: Thank you, your Honor. Mr. Jenkins.

Mr. Jenkins: We call as our first witness Miss Sharon Neal.

SHARON NEAL, called as a witness in behalf of the Plaintiffs, who being first duly sworn, testified as follows:

Direct Examination by Mr. Jenkins:

Q. Miss Neal, what is your middle initial? A. W.

Q. So you are Miss Sharon W. Neal? A. Yes.

Q. Are you one of the Plaintiffs in this action? A. Yes.

Q. Miss Neal, are you a member of the Negro race? A. Yes I am.

Q. Do you recall that sometime during the month of August of 1964 you had occasion to visit one of the establishments owned by the defendant, that is to say Piggie Park Restaurant? A. Yes.

Q. Do you recall what day it was? A. It was in August of 1964, I don't remember the date.

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Q. August 12, 1964, is that correct? A. Yes.

Q. Do you recall the approximate time of day? A. I am not sure. I believe it was around 2:00 o'clock, I am not sure.

Q. It was in the afternoon? A. Yes.

Q. Do you recall what particular establishment you visited? A. It was the Piggie Park.

Sharon Neal—for Plaintiffs—Direct

Q. There are several Piggie Park establishments, do you know that? A. Yes.

Q. Which one did you visit on that day? A. I don't remember. It was, I believe, on Two Knots Road.

Q. And does the Summerton Highway mean anything to you? A. Yes.

Q. Is it not a fact that you visited the Piggie Park establishment that is located on the Summerton Highway? A. Yes.

Q. Is that in or near the City of Columbia, South Carolina? A. Yes it is.

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Q. Do you know that was called Summerton Highway is U: S. Highway No. 78 and U. S. Highway No. 378?

Mr. Ray: If your Honor please, I would like to object to counsel testifying and asking for a yes or no answer.

The Court: Mr. Jenkins, this is your witness. I ask you not to propound leading questions that indicate the answer.

Q. Miss Neal, were there other persons accompanying you on this occasion? A. Yes.

Mr. Ray: If your Honor please, she said nothing about other persons, and he's still testifying.

The Court: He is asking if other persons were with her. I think that is a proper question.

A. Yes there were.

Q. Do you know the names of those persons? A. Yes, sir, I do.

Q. Would you state their names? A. Mr. Bernard Moore, and Mrs. I. D. Newman.

Q. I. D. Newman? A. Yes.

Q. Is Mrs. Newman one of the plaintiffs also? A. Yes she is.

Q. How did you arrive at this Piggie Park establish-

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ment? A. We went there to get something to eat.

Q. What was your mode of travel? A. We were in a car.

Q. A car? A. Yes.

Q. Do you recall the seating arrangements of the persons in the car? A. Yes I do.

Q. Who was driving the car? A. Mrs. Anne Newman was driving.

Q. Where were you seated? A. I was seated in the back, to the right of the car.

Q. Where was Mr. Moore seated? A. In the front seat.

Q. Now, did you drive on to the premises of the Piggie Park? A. Yes we did.

Q. Do you recall anything that happened there which attracted your attention? A. Yes. We noticed commotion in the kitchen among the people when they saw us come in.

Q. Would you care to elaborate on that please? A. A person came out and she saw us outside. They went back

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in and told the other people we were out there.

Mr. Ray: If your Honor please—

The Court: Did you hear her tell the other people?

A. No I didn't.

The Court: Well you can only testify to what you know; not what you surmise or guess.

Q. After this person came out, saw you, went back into the establishment, was a conversation between this person and some other persons? A. Yes there was.

Q. You didn't hear what was said? A. No I didn't.

Q. Now, what portion of the establishment did this person come out? A. It was, I am not sure I believe it was the side to the left of where I was facing.

Q. Would it be, was it from the main dining room, or from some other part of the establishment? A. No, I think it was the kitchen.

Q. Was this person dressed in any uniform, or any peculiar manner of attire? A. No.

Q. Just ordinary attire? A. Yes.

Q. Could you determine whether this person was an employee of the defendant? A. No I couldn't.

Q. You couldn't tell? A. No.

Q. Your testimony, I believe, has been that persons in the restaurant came and watched you persons who were in the car? A. Yes they did.

Mr. Ray: I can't see any relevancy to that, that people watched them.

The Court: Well, let's go ahead, this is a non jury case, and we don't have to be too particular what comes in and what doesn't.

Q. Could you determine whether these persons were employees of the defendant? A. Yes they were.

Q. They were employees? A. Yes.

Q. Did any employee of this establishment ever come out to the car where you were seated? A. Yes.

Q. Will you state what occurred thereafter? A. Well the waitress came out to take our order. When she came near the car, she turned around and went back inside.

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Q. Did she take an order? A. No she didn't.

Q. Did you offer to make a purchase? A. Yes we tried.

Q. Thereafter did anything else happen? A. Yes. A man came out later and he came over to the window as if to take an order, but he didn't. I mean to the car, he had a conversation with Mr. Moore.

Q. Could you tell whether this person was an employee of defendant? A. Yes he was.

Q. He was? A. Yes he was.

Q. Why do you say he came as though—? A. He had the ordering pad in his hand and a pencil and everything as if to come take one.

Q. There was a conversation you say? A. Yes.

Q. Between this employee of the defendant and Mr. Moore? A. Yes.

Q. Now, during that conversation, did anybody in the car attempt to place an order? A. Mr. Moore did.

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Q. Did you over hear the conversation? A. Yes I did.

Q. Can you recall what was said generally? A. Yes.

Q. State what was said. A. Mr. Moore went ahead to place an order. We gave our order to Mr. Moore, he went

to place it and the fellow that came to the car refused us. He didn't say why, and Mr. Moore tried to get him to say why he refused us, but he wouldn't.

Q. He never gave any reason why he did not take your order? A. No.

Q. Did the person ever, this employee, ever state that he would take your order? A. No he didn't.

Q. Was there any other conversation between anybody in the car and this employee? A. No.

Q. Did anyone else then come out? A. No, not after that, no.

Q. Were you orderly in your bearing, well-behaved? A. Yes.

Q. There was no argument—was there any argument? A. No, there was no argument.

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Q. Was there any disturbance at all? A. No.

Q. Was any reason given for you not being served? A. No there wasn't.

Q. Were you ever served on that occasion? A. No.

Q. Miss Neal, were there other cars parked in this area when you drove up? A. Yes. Approximately three.

Q. Three cars? A. Yes.

Q. Did you observe the persons in those cars? A. Yes we did.

Q. Do you recall whether those persons had been served? A. Yes, they were eating at that time.

Mr. Ray: If your Honor please, I don't see where that would be relevant at all.

The Court: Well I will let it come in, go ahead.

Q. You say they were eating? A. Yes they were.

Q. They were on the premises of the defendant? A. Yes.

Q. Did you observe the race of these people? A. Yes.

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Q. Were any of them Negro? A. No they were not.

Mr. Jenkins: Your witness.

Cross Examination by Mr. Ray:

Q. Miss Neal, have you ever been to the Piggie Park Enterprises since this time in August? A. No I haven't.

Q. Prior to August, 1964, had you ever been in Piggie Park Enterprises? A. No.

Q. Any establishment of Piggie Park Enterprises? A. No.

Q. You are sure of this? A. Yes I am.

Q. Have you ever been refused service at any other restaurants in Columbia? A. Yes I have.

Q. Any other places of business? A. Yes.

Q. At any of those places of business did anyone tell you why they were not going to serve you? A. Yes they did.

Q. They did not tell you? A. They did.

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Q. They did not tell you this at Piggie Park? A. No they didn't.

Q. Do you live in Columbia? A. Yes, now I do, yes.

Q. Did you live in Columbia at that time? A. Yes I was living there.

Q. Do you eat out at restaurants very often? A. Not very often; I do sometimes.

Q. On this particular day, you have remembered what you did, what did you do after you left Piggie Park?

Mr. Jenkins: Your Honor, at this point we see no connection between the line of questioning and the matters before the court.

The Court: Well, as I told Mr. Ray in the beginning, this is a non jury case, not a jury case, and I am not going to adhere strictly to the rules of evidence, and rules of relevancy. A good many matters will be brought out that probably won't be relevant, but it is left up to the court to determine what is and what is not.

Q. What did you do? A. I returned to school.
Q. To school? A. Yes.

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Q. Where did you go to school? A. Benedict College.
Q. Benedict College. Did you, on this particular day, did you eat dinner that day? A. Yes I did.
Q. And what time did you eat dinner this day? A. I believe it was around 4:00 o'clock. I am not sure.
Q. What time did you eat breakfast?

The Court: Mr. Ray, I let you go into this, but I mean I just don't see any point in following this to its illogical conclusion, unless you can point out to me what the relevancy of it is.

Mr. Ray: That is all right, sir.

Q. But at no time, Miss Neal, did anyone tell you that, at Piggie Park, did anyone tell you you were being refused food because you were a Negro? A. No they didn't.

Q. Was it said to anyone in that automobile? A. No.

The Court: Is that all, Mr. Ray?

Mr. Ray: Yes, sir.

Redirect Examination by Mr. Jenkins:

Q. Miss Neal, did you testify in answer to a question by

counsel, you are a student? A. Yes.

Q. Now where is your native home? A. New York City.

Q. Why are you in Columbia? A. I am attending college there.

Q. Is that your reason for being in Columbia? A. Yes.

Q. Are you living in Columbia temporarily then while in school? A. Yes I am.

Q. Is it your intent to return to the State of New York after you complete your training? A. Yes.

Mr. Jenkins: That is all.

The Court: All right. Step down.

Mr. Perry: Mr. Price.

Leonard L. Price—for Plaintiffs—Direct

LEONARD L. PRICE, called as a witness in behalf of the plaintiffs, who being first duly sworn, testified as follows:

Direct Examination by Mr. Perry:

Q. Would you state your name and address, please? A. I am Leonard Price, Columbia, South Carolina, president of Germany Roy Brown Company, 911 Washington St.

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Q. Mr. Price, what is the nature of the business of Germany-Roy-Brown and Company? A. We are in the wholesale beer business.

Q. Would you tell use please what products your company distributes? A. We sell Budweiser, Bavarian, and Michelob.

Q. Can you tell us, Mr. Price, whether your company sells beer, or other supplies, to the Piggie Park Enterprises of which Mr. L. Maurice Bessinger is president? A. We did. Of course today he does not have a beer license, and we don't sell him now.

Q. When is the last time your company sold beer to Mr. Bessinger's enterprises? A. About mid 1964 I believe. I don't have the exact time.

Q. About mid 1964? A. Yes.

Q. All right, then. Can you tell us please whether—you say about mid 1964, do you have any recollection whether you have sold Mr. Bessinger's enterprises any beer products since July 2, 1964? A. I couldn't specifically state that we have. He bought a new beer license, I believe in 1964 at the beginning, which was July 1, and we sold him until he decided to discontinue beer.

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Sharon Miles—for Plaintiffs—Direct

SHARON MILES, called as a witness in behalf of the Plaintiffs, who being first duly sworn, testified as follows:

Direct Examination by Mr. Pride:

Q. Please state your full name and address? A. Sharon A. Miles, Columbia, South Carolina.

Q. How long have you lived in Columbia, South Carolina? A. Year and a half.

Q. And prior to that where did you live? A. Bloomington, Indiana.

Q. Are you a permanent resident of South Carolina? A. No I am not.

Q. Where are you planning on residing? A. Washington, D. C.

Q. Washington, D. C. Have you ever had occasion to enter one of Piggie Park stores owned by Mr. Bessinger in Columbia? A. Yes, I have, last Saturday.

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Q. Last Saturday? A. Yes, sir.

Q. I believe that would be the second of April, is that correct? A. That is correct.

Q. About what time was that? A. Around 1:00 o'clock in the afternoon.

Q. Could you tell us exactly where that establishment was located? A. On Main Street in Columbia.

Q. On Main Street. Would you describe the inside of the establishment? A. Yes. There is a line to the left of the building where the food is distributed, and along the right as you enter on the righthand wall there are tables at which you are seated.

Q. In terms of whether it a restaurant or cafeteria style, which one is it? A. Cafeteria.

Q. Cafeteria style. Were you greeted at the door by any of his employees? A. No I was not.

Q. Tell us, did you just go in and take a seat? A. I went in, stood up and got my food, then I went to my table and sat down.

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Q. Did anybody inquire of you where you were from? A. No they did not.

Q. Did anybody make any demands upon you? A. No they didn't.

Q. Of presenting any type identification or anything? A. No, none.

Q. So no one knew where you were from while you were in there? A. That is correct.

Q. What did you order? A. Sandwich and a cup of coffee.

Q. Did you see any other Negroes in there? A. No I did not.

Q. They were all white? A. Yes, as far as I could tell.

Q. Did you have occasion to observe any of the products that were being sold in there? A. Well besides there was the food displayed as they were preparing it along the table that we were getting our food, and there were a few large cans of food underneath one of the tables to the left.

Q. Do you know what type of food that was? A. I am sorry I don't remember.

Q. Could you see where any town or state was marked

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on it? A. I don't remember specifically.

You don't remember? A. No.

Sharon Miles—for Plaintiffs—Cross

Mr. Pride: Would you induge me just a moment, your Honor.

Q. When you got ready to leave, did anybody make any demands on you, or ask you any question as to where you were from? A. No they did not.

Q. Do you know the general policy of the proprietor, or Mr. Bessinger in that particular place? A. Yes I do.

Q. Do you know it in regard to race? A. Yes I do.

Q. Would you tell us please? A. Yes. There is a sign on the restaurant that I went into in Columbia which I believe said we cater to white trade only.

Mr. Pride: Answer any questions Mr. Ray may ask you please.

Cross Examination by Mr. Ray:

Q. Where do you live? A. I live in Columbia.

Q. How long have you been there? A. About a year and a half.

Q. About a year and a half. What do you do there? A. I am a housewife.

Q. Does your husband live there? A. Yes he does.

Q. Does he work there? A. Yes he does.

Q. Before you entered this place of business—you are Mrs. Miles? A. Yes.

Q. Where is your husband from? A. Originally?

Q. Yes. A. From Little Rock, Arkansas.

Q. From Little Rock, Arkansas? A. Yes.

Q. Are you a college graduate? A. Yes I am.

Sharon Miles—for Plaintiffs—Cross

Q. What school did you go to? A. University of California.

Q. And how old are you? A. I am twenty-six.

Q. Twenty-six, and your husband a college graduate? A. Yes he is.

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Q. Where did he go to school? A. University of California, A.B. Degree; and a Master's Degree from Indiana University.

Q. What does he do? A. He is director of the South Carolina Voter Education Project.

The Court: What is his position?

A. Director.

The Court: Of what?

A. South Carolina Voter Education Project.

Q. Who sponsors the South Carolina Voters Education Project? A. It is an independent organization.

Q. I beg your pardon? A. Independent.

Q. By independent, what do you mean? A. Well I mean they are self-supporting.

Q. Well when you went into the Piggie Park place on Main Street, did you look in the window? A. No I did not.

Q. As you went in? A. No I did not.

Q. Then how did you see a sign there that said we cater to white trade only? A. I passed the Piggie Park many times. I have noticed the sign before.

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Q. Is that the Piggie Park you went in? A. Yes I believe it was.

Q. Right there (exhibiting photograph)? A. Yes.

Q. Is that a reasonable representation of the front of it at the time you went on Saturday? A. I don't remember this sign right here. As far as I can, otherwise it is.

Q. What is your husband's name? A. Richard Miles.

Q. Richard Miles, and do you classify yourself as a Negro or white person? A. I am caucasian.

Q. Caucasian, and your husband? A. He is caucasian.

Q. And you lived in Columbia, South Carolina, for a year and a half? A. That is correct.

Q. What is your address there? A. 1208 Hardin Street.

Q. When you walked into this place, did you speak to anyone? A. I did not except to the woman who took my order.

Q. That took your order. A. Yes, sir.

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Q. Well you said just now this place was cafeteria style. A. Yes.

Q. And when you move, do you pick up your food as you move down the line? A. I ordered from her. She prepared my food, then I moved down the line and someone gave me my cup of coffee.

Q. How was the food laid out, they cook—? A. She prepared the sandwich in front of me along the counter right below where the tray is.

Q. How did she prepare it, what did you order? A. A sandwich.

Q. What kind? A. A barbecue.

Q. A barbecue sandwich? A. Yes.

Q. And was it sliced barbecue or chipped barbecue? A. I believe it was chipped.

Q. And it was put on bread or buns? A. On a bun, yes.

Q. And then after that was done, what did the person that waited on you do with the food? A. She handed it to me.

Q. Did she hand it to you with her hand? A. As I remember she handed it to me on a plate.

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Q. What kind of plate? A. I am sorry, I don't remember.

Q. Was it a paper plate or China plate? A. I don't remember. I think it was a paper plate because I think I remember depositing it in a trash basket.

Q. And was it just a small plate or paper tray kind of affair? A. I think it was a small plate.

The Court: I had a tray.

Q. And how many people were in the place when you went in at 1:00 o'clock about? A. There were about six or eight other people, I think.

Q. Was there a steady stream of people coming through there or just a few? A. When I came in there was a small line, but after a while it sort of trickled off. There was not a large number of people at the time I ate.

Q. Most of the people that were in there, did they sit down to eat? A. As I remember all of them did. I don't remember anyone just taking an order and going out.

Q. Was there any wax paper around your sandwich when she handed it to you? A. I don't believe there was, but I am sorry I don't remember exactly.

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Q. What type of spoon were you served with your coffee? A. I was not served a spoon.

Q. Did you obtain one? A. No I did not.

Q. You drank your coffee black? A. That's right.

Q. Your coffee was in a glass cup? A. I believe it was a China cup, I am sorry I can't remember.

Q. You don't really know. You say it is your testimony you lived in Columbia for a year and a half? A. Yes, sir, that is correct.

Q. And how did you happen to go down to Piggie Park this past Saturday, is that your usual place of eating? A. No it is not. This is the first time I been in the cafeteria. I have eaten at Piggie Park other places.

Q. Piggie Park other places, you mean in Columbia? A. No, I have eaten in Piggie Park in Orangeburg.

Q. And you never been at 1430 Main Street, Piggie Park there before until last Saturday? A. That is correct.

Q. And why did you go there? A. My husband asked me to go there.

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Q. Your husband? A. Yes.

Q. Asked you to go there? A. Yes.

Q. Did you ask him why? A. Yes I did.

Mr. Perry: Your Honor, may I submit that the reason the witness went to the defendant's place of business is without relevance.

The Court: Will you let him finish?

Mr. Ray: But he's fixing to testify why she went there.

The Court: I will let him finish.

Mr. Perry: May I submit the reasons behind the witness's going to the place of business are without relevancy and can serve no useful purpose to these proceedings. That is the basis.

The Court: You object to this line of questioning?

Mr. Perry: I do.

The Court: All right, Mr. Ray. I will hear from you now.

Mr. Ray: I have nothing further to ask the witness.

The Court: Well what is the relevancy of this

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line of questioning?

Mr. Ray: I was actually testing what her motives and everything else was in going there, your Honor. They have alleged—I am trying to find out the relevancy of why she went there. I assumed that he intends to prove by her going there that this was an interstate traveler I guess. I really don't know, but I was trying to find out. And in addition to that, she remembered quite a bit of things that I was trying to find out how much more she remembered. She didn't remember but one sign in the window, and there was another one there right with it just as big or bigger than that was.

The Court: Do you have any more questions?

Mr. Ray: No, sir. I think that is plenty.

Mr. Pride: You may come down.

Mr. Perry: Plaintiffs rest, your Honor.

The Court: All right.

Mr. Ray: May I have just a few minutes, your Honor, I will appreciate it.

(The hearing recessed briefly and reconvened.)

The Court: All right, Mr. Ray.

Mr. Ray: If your Honor please, for the record we would like to move to dismiss the Complaint of the Plaintiffs, first that this was apparently a class action. There is no evidence whatever to indicate

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that Mr. Bessinger's employees, whoever they might have been at that particular time, refused to serve the only person that has testified Sharon Neal because of race.

The Court: Well that is the testimony here that posted signs on the premises say that they only cater to white.

Mr. Ray: That is at one of the businesses, if your Honor please. There are four. That is the downtown business at 1430 Main Street.

The Court: Well you are saying there are not signs at the other places?

Mr. Ray: No, sir. I am not saying that, no, sir. There has been no, secondly, there has been no proof offered whatsoever that there has been any service or offer to serve interstate travelers. Now Mrs. Miles was put on the stand, and it developed she had been living in the State of South Carolina for a year and a half, and I don't see how she could possibly come within the term interstate traveler by any stretch of the imagination.

Motion to Dismiss

The Court: Well is it your position he doesn't serve interstate travelers?

Mr. Ray: That's right, sir.

The Court: What does he do to protect himself

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from serving them?

Mr. Ray: Well if your Honor requires us to go—

The Court: I stopped on several occasions at the one on West Columbia and pushed the button where no one could see if I was in South Carolina license, no one asked me whether I was intra or interstate, whether I was a resident of South Carolina or North Carolina.

Mr. Ray: That's right, but we will have some evidence on that.

The Court: I overrule your motion on that ground.

Mr. Ray: And thirdly that there has been no evidence introduced to show that a substantial portion of the food that he serves has moved in commerce, food as distinguished from some other items, if your Honor please. There is nothing to measure that by that has been introduced.

The Court: What is your conception of the legal definition of substantial?

Mr. Ray: If your Honor please, that is one of the basis of one of our defenses that it is incapable at any given time of being the same thing.

The Court: That is a matter of factual determination of the Court after hearing the evidence. I have

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certainly heard enough evidence to make a prima facie showing there is a substantial amount of food products traveled in interstate commerce. The last witness alone, Mr. Wilkerson, testified they sold to the defendant in the year 1964 some forty thousand dollars worth of merchandise, in 1965 some thirty-two thousand dollars worth of merchandise, two-thirds of which would have traveled in interstate commerce they purchased from out of the state. That, to me, is a prima facie showing of a substantial amount.

Mr. Ray: Depending on what you are measuring.

The Court: Of course $10 is a substantial amount as to say $15 to $25, but $10 may not be a substantial amount as to $100,000. But I surely say that as of right now, there is a prima facie showing that the defendant is serving a substantial quantity of foodstuffs that have moved in interstate commerce. That may be rebutted by your evidence, but I would say as of right now, that is a prima facie showing.

Mr. Ray: All right, sir.

The Court: Any other motions? Your motion based on any other ground? Motion to dismiss

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based on any other grounds?

Mr. Ray: I would like to base it— I think that will be all. Call the first witness Miss Merele Brigman.

Merele Brigman—for Defendants—Direct

MERELE BRIGMAN, called as a witness in behalf of the Defendants, who being first duly sworn, testified as follows:

The Court: Let the record show I overrule the motion on all grounds. We proceed to take the testimony of Defendants.

Direct Examination by Mr. Ray:

Q. Your name is Mrs. Merele Brigman? A. Yes.

Q. Where do you live? A. Columbia.

Q. And by whom are you employed? A. Piggie Park Enterprises.

Q. And what is your job, Mrs. Brigman? A. I am bookkeeper and buyer.

Q. And do you make all of the purchases for Piggie Park Enterprises? A. The majority, yes.

Q. Do you keep in your possession or in your custody all of the records pertaining to it? A. I do.

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Q. How long have you been working for Piggie Park Enterprises? A. Two years March 23.

Q. At my request have you examined the records for Piggie Park Enterprises back over the past couple of years? A. Yes, sir, I have.

Q. What basis does Piggie Park keep its books, on a calendar year basis or fiscal? A. Fiscal year, June 1st to May 31st.

Q. And have you had occasion to go over the food and related items purchased during the year, fiscal year 1963-64, '64-65 and for the first six months of '65-66? A. Yes, sir.

Q. And do you know, have you compiled those records? A. Yes, sir.

Q. And at whose request did you do this? A. Yours.

Q. For the fiscal year 1963-64, what were the total purchases, what is that that you have in your hand? A. This is a photostatic copy of a chart I made totaling up the invoices of each supplier that we bought from.

Q. What are the total purchases for food and related

items by Piggie Park? A. From June 1st of 1963, through May 31 of '64 we bought $240,565.58.

Q. All right, maam. 1964-65? A. We bought $222,845.26.

Q. Is that correct, that last figure? A. Yes, sir. June 1st, '64 through May 31, '65.

Q. And for the first six months of '65-66? A. This is through December 12, 1966 we bought $122,724.13.

Q. You mean '65 through December 12, 1965. A. No, sir, June 1st, 1965 through December 12, 1966. Oh, I'm sorry, yes, sir. '65. I'm sorry

Q. And did you tabulate those total purchases? A. Yes, sir.

Q. Have you had occasion to visit the various Piggie Park Enterprises? A. Yes, sir.

Q. I'd like to ask you, Mrs. Brigman, if you recognize that picture? A. Yes, sir. That is Piggie Park on Two Knots Road, which is known as Piggie Park No. 3.

Q. How about this one, do you recognize it? A. Yes, sir. That is Piggie Park, Sumter Highway, which is Piggie Park No. 2.

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Q. That one? A. That is Little Joe Sandwich Shop, downtown Main Street.

Q. And this one? A. That is the Piggie Park on Charleston Highway, which is known as Piggie Park No. 1.

Mr. Perry: We have no objection.

The Court: Very well.

Mr. Ray: If your Honor please, I have four photographs I would like to introduce.

The Court: Defendants' A, B, C, and D.

Q. Mrs. Brigman, are there any signs pertaining to interstate travelers, or service to interstate travelers located on the premises of Piggie Park Enterprises? A. Yes, sir.

Q. And what do those signs say? A. We do not serve interstate travelers.

Q. Are they posted in the window? A. Yes, sir, they are in the window.

Q. And when were those signs put there, do you know? A. Not the exact date, no, sir, but it has been a couple of years.

Q. Thank you, maam. And do those signs appear on each of the photographs that I have here in my hand? A. Yes, sir.

Q. Have you made any effort to determine what per-

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centage or percentages of the food purchased has been purchased from suppliers without the state with reference to articles being ground, manufactured, or packed, processed within this state? A. You want within this state or out?

Merele Brigman—for Defendants—Cross

Q. With reference to that, have you made any effort to determine what percentage of the food that is purchased—? A. Yes, sir.

Q. And for the year 1964-63-64, what percentage was that? A. Food processed and/or manufactured in South Carolina?

Q. Yes maam. A. I came up with 75% of the total amount of money spent for foods.

Q. All right, maam. And how about 1964-65? A. The same thing.

Q. How about the first part of '65-66? A. Well I came up with 82%.

Q. Is there any reason for the difference there? A. Yes, sir. We buy as much as possible of processed food in South Carolina, and every day I am searching for new suppliers that process their food in South Carolina.

Q. And/or grow it? A. Yes.

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Mr. Ray: I have no further questions.

Cross Examination by Mr. Jenkins:

Q. Mrs. Brigman, what effort is made by the Piggie Park Enterprises at the various establishments to determine whether a prospective purchaser is an interstate traveler? A. You mean a customer?

Q. Yes. A. I am sorry, would you repeat the question.

Q. Maybe I should elaborate a bit. You say these various establishments have signs posted which say in effect we do not cater to interstate travelers, is that correct? A. Yes. We do not serve interstate travelers.

Q. Now, my question is, what effort is made by the particular establishment to determine whether a person who offers to purchase is in fact an interstate traveler or not? A. The only way we have is by the car license.

Q. Car license? A. Yes, sir.

Q. Now explain what the procedure is when a car comes up with a customer. A. Well if a car comes up with a customer and we see that he is from out of state we tell them we do not serve interstate travelers.

Q. Do you know that as a fact? A. Yes, sir.

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Q. Do you visit the various establishments? A. Well my office is right next door to one on Sumter Highway.

Q. You observe every car that comes up? A. No, sir.

Q. Now, with reference to the three other establishments, how do you justify your statement? A. Well I am in charge of all of the records, and we write a ticket for each customer that comes up and orders over our intercom system, and if the girl, the curb girl when she is out on the curb she sees these cars, and I have when these tickets come through the office we have tickets that are voided, and each ticket has to have a reason on the back, and it says that this was an out of state customer and therefore they voided the ticket and did not serve them.

Q. Now, do you know whether there may be out of state customers served and tickets not voided? A. Well, I don't know, sir.

Q. So then this alleged check which you say you follow is not then an accurate measurement on what takes place is it? A. No, but those are the ones I know. You asked me

how do I know for a fact; those are the ones I know for a

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fact that are not served.

Q. Insofar as you know any particular day you may have ten tickets voided because of out of state license on the car? A. That's right.

Q. When in fact there may have been 200 persons served with out of state license? A. Well we may catch them before the ticket is written and rung up. If that is the case, we do not write a void ticket.

Q. My question is, is it quite possible under your system of check that 200 out of state cars, occupants, may in fact be served and you only void five out of state? A. Well no, sir. 200 is too many because we don't have that many customers a day at one particular drive-in because we do have a count of our customers.

Q. That of course, the figure I used is taken out of the sky. All I am getting at is you really have no method. This method you now mention is not an accurate method of who may be served there? A. That's right.

Q. That is correct, is it not. Every order that is placed in your establishment is indicated by a ticket? A. Yes.

Q. Those tickets come into your possession? A. Yes.

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Q. You have any of them with you? A. No, sir.

Q. You knew you were going to be a witness here today didn't you? A. Yes.

Q. And you knew you would testify as a person who is in charge of records of the defendant corporation, is that not correct? A. Yes.

Q. And you made no effort to bring with you these records which you reasonably could have anticipated that you would ask for? A. Well, no.

Mr. Ray: If your Honor please, I don't think that question is proper question. She wasn't to anticipate every question that counsel would ask her.

Mr. Jenkins: I feel certainly—

Mr. Ray: It goes into conjecture. They have an established practice. They can't go out and take the pedigree on everybody that comes on the lot. All they can do is make a reasonable effort, and I think they have done that.

The Court: Well that is for me to decide and not for you.

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Mr. Ray: Yes, sir, I understand that.

The Court: I want to hear everything I can that assist me in making that determination. As I understood his question, he's merely asking her whether or not she knew she was going to be a witness and she would in all probability be called upon to testify as to the practice of the defendant in what it did or did not do in reference to the service of interstate travelers.

Mr. Ray: Yes, sir. I didn't mean to insult the Court.

The Court: I am going to let him go into that. That, as I understand, is one of the issues that must be determined by the Court in reference to this case.

Mr. Ray: I didn't mean to insult the Court. I merely thought I should interpose the objection at that time, and that I would have been amiss, as counsel, if I hadn't done so.

The Court: All right.

Q. Mrs. Brigman, I believe you say you do not have those records? A. No I do not.

Q. Can you obtain those records? A. No I can not. I can for this week. We throw them away. Now I keep all

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void tickets, but we only have carbon copy because the customer gets the original, and after we check them they are thrown away.

Q. You keep them only a week? A. That's right.

Q. Yet you say you keep these void tickets. You care to tell us why you keep the void tickets? A. Well because on our register we have a running total of the sales and a void ticket is rung up and so therefore it is counted as a sale, and on my sales report I subtract these void tickets so the manager is not responsible for only the money that she has collected. Therefore for audit purposes, I have to keep these void tickets so he can see why I am subtracting this money.

Q. I am not certain I quite understand your use of the void tickets. Perhaps you testified, but tell us again, when a void ticket is used, when is a ticket voided? A. Well if the person ringing up the order on the register should make an error in charging a customer, it is voided and rewritten, that is one case. As I stated, if it is an interstate traveler

and we do not catch it until the ticket has been rung up, that would be a void ticket.

Q. If I may stop you right here. That is what I am a bit puzzled about. Do you mean to say a person may come up,

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interstate travelers and order and be served and you later determined that person was an interstate traveler and the person doesn't have to pay for it? A. Oh no, that's not what I mean at all.

Q. Explain to me so I understand what you mean. A. Well when some periods of the day we are real busy, and we may not catch them. We take the order as the button is pushed and it may not be until a few minutes later that a girl or lady notices the interstate traveler. Then we may not even be prepared the food, but it is already taken and rung up and over there on the line to be prepared.

Q. Then under that circumstance you then advise the interstate traveler we can not serve you? A. That is right.

Q. But your ticket would have showed that you had served that person? A. No, it will say on the back this ticket voided because of interstate traveler, and that is why the ticket is voided because we didn't serve him and collect the money. If we collect the money we don't void a ticket.

Q. That is your own method then of determination whether a person is out of state traveler? A. That is my only way. That is the only proof I have through the office. Now the managers of the drive-in have their proof, their word, and their girls' word.

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Q. But as far as you're concerned you only have the tickets which come into you? A. That's right.

Q. As a matter of fact you can not say from this stand what actually happens at these various establishments, can you, other than what comes in on tickets? A. That's right.

Q. And you don't have those tickets with you? A. No I do not.

Q. Your only method of determining a person is out of state traveler is that a person is in their vehicle with an out of state license, is that correct? A. That's right.

Q. You will concede however that it is entirely possible that a person could be traveling from Georgia to North Carolina and pass through Columbia in a car with a South Carolina license plate on it, would you concede that? A. Well I would have to say yes, because who am I to say.

Q. In your method of checking interstate travelers isn't very good yardstick is it? A. Well it is the best we come up with.

Q. But you admit it isn't very accurate is it? A. Well, No I think it is pretty good.

Q. Do you, Mrs. Brigman, serve pedestrians in your

place of business? A. Not at the drive-ins. I mean there is a drive-in now, we have one walk-in establishment.

Q. That is Little Joe? A. Yes.

Q. Now, persons who come into Little Joe's how do you determine whether they are interstate travelers? A. Well we have no way of telling. We just have the sign in the door, right at the door as you come in, and we have noticed people reading the sign and walking on. That is the only way we have of turning these interstate travelers away to my knowledge.

Merele Brigman—for Defendants—Cross

Q. The fact is your method of determining whether a person is out of state traveler presupposes that a person can read? A. I beg your pardon?

Q. How else would a person determine your policy without being able to read? A. Well that is the only way.

Q. So it is possible that interstate travelers could eat in your place? A. Yes it is possible.

Q. And would you concede that it is entirely probable that many interstate passengers eat in your various estab-

lishments? A. Well none we catch eat.

Q. But you also admit that your method of catching these people is not infallible? A. Like I said, it is the best we come up with so far.

Q. Now, as far as Main Street is concerned all your business is walk-in business, I believe? A. Yes, that's right.

Q. And you acknowledge you have no way of telling whether those persons of interstate travelers— A. No, only those persons that read the sign and walk away.

Q. Have you ever seen anybody read the sign and walk away that would not have been served anyway? A. I don't know.

Q. You serve Negroes in your establishment? A. No.

Q. You don't? A. Oh I'm sorry we do.

Q. You do? Under what circumstances? A. Orders to go served in the kitchen.

Q. Explain that to us please. A. Well if a car comes up and it is colored people, we are not integrated, and he orders something and we tell him that the order will be packed to go and he can pick it up in the kitchen.

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Q. That is only a Negro? A. That's right. We don't tell interstate travelers that.

Q. You don't tell anybody that but Negroes? A. Well that's right.

Q. And the reason is you say you are not integrated in your establishment? A. That's right.

Q. You mean in fact you discriminate against a man because of his race and color in services rendered in your establishment? A. I don't know if that is the reason or not.

Q. You do make a difference based purely on race or color? A. No we base it on the fact we are not integrated.

Q. Well explain to me what you mean by not integrated? A. Well we do not serve colored people or interstate travelers.

Q. You put them both in the same category? A. Yes under the law I guess so.

Q. Under the regulation of your establishment? A. That's right.

Q. A Negro person of—

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Mr. Ray: If your Honor please, she already testified that they serve them food when they come up there and want it. She testified to that.

The Court: Serves who food?

Mr. Ray: Colored people food when they come up and ask for it.

The Court: I understood her to testify, didn't you say the only colored people you serve are for consumption not on the premises, take out orders only, they have to pick up in the kitchen?

A. That's right.

The Court: If a colored person came to one of your drive-in restaurants and pushed the button and placed an order and you prepared the food, and you took it out and saw it was a colored person, you wouldn't serve them?

A. Well we haven't ever had that happen to my knowledge.

The Court: Well if a colored person came into Joe's Restaurant down there at the sandwich shop on Main Street and sat down and wanted to be served, eat on the premises, would you serve them?

A. Our policy is not to serve them; sir.

The Court: Where did you get the idea she testified if colored people came in and wanted service—?

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Mr. Ray: If your Honor please, I was talking about serving food. I didn't mean to try to confuse you that at the drive-in they got full service out there. His question was so phrased as to bring her answer out when she already said they serve food.

The Court: Is there any dispute about the fact that Piggie Park doesn't serve colored people on the same footing, any dispute of the fact on that?

Mr. Ray: No, sir. I don't think so, but they do serve them, I do want that in the record.

The Court: I understand she said they served them for take out orders, if they placed an order they could come in the kitchen and pick it up and take it out and eat them off the premises.

Merele Brigman—for Defendants—Cross

Q. Does Piggie Park Enterprises advertise through the media of radio and television? A. No T. V., we do through radio and newspaper.

Q. And newspaper. Do your advertisements over the radio and in the newspaper say anything about your policies of not serving interstate passengers? A. Yes in the newspaper, we do not serve interstate travelers.

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Q. What does it say in reference to service of Negroes? A. Doesn't say anything.

Q. Insofar as your advertisement in the newspaper is concerned the public generally is invited into your establishment for equal footing, is that correct? A. That is the ad is an invitation.

Q. Is an invitation to the public generally isn't it? A. Well yes.

Q. And would it be reasonable for the public generally to assume that there would be no difference in treatment because of race or color in your establishments? A. Would you ask the question again?

Q. Then from the reading of your newspaper advertisements, the public generally has no reason to believe that any member of the public would be treated differently once that person come to your establishment and demanded food? A. No, sir.

Q. So a Negro then would read the advertisement and reasonably assume that you invited him in to do business and would not learn of your different policy until after he accepted your invitation, is that correct? A. I guess that would be right.

Q. Now, with reference to your radio advertisement, what does it say with reference to your service of interstate

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travelers, nothing? A. Nothing.

Q. And it says—

The Court: What was your answer?

A. Nothing.

Q. And it says nothing with reference to your policy of non service of Negroes except by way of kitchen take out? A. Doesn't say that. The radio?

Q. Doesn't say anything at all about that does it? A. No.

Q. Now then, tell me this, any Negro who comes on to your place with the exception of Main Street establishment and seeks service is told that you may have service on a take out basis by going to the kitchen and picking up yourself? A. Yes.

Q. And you made no effort to determine whether that Negro is interstate travelers or intrastate? A. Yes.

Q. What effort? A. The same effort we have with the other.

Q. But no different? A. That's right.

Q. So if an interstate traveler, a Negro, parked his car out on the road and walked into your place you would serve

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him around at the kitchen, would you not to take out to his car? A. Well if we knew he was interstate we would not, but—

Q. You made no effort to determine—? A. If he's going to park down the road and come back.

Q. Again your custom is based on race or color? A. On that to go order, yes.

Q. Now, I want to ask you something about your testimony with reference to what your records show as total purchases in various years, you testified for a period June '63 through May '64. Now we aren't concerned with that here, I don't believe, you agree on that? A. That's right.

Q. Now then, you talked of a fiscal year '64-65, that you bought $222,000 plus dollars worth of purchases. A. That's right.

Q. Does your list show each supplier? A. Yes.

Q. It does. Does your list show what was purchased from each supplier? A. Well I have it broken down into meat, produce, and sirups, and cleaning fluid and cleaning items rather.

Q. And the amount of those purchases? A. Yes.

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Q. Now, do you have extra copies of that record? A. This is the only one I have with me.

Q. Do you have a copy that you could supply the Court with? A. At my office.

Q. With you. A. Oh no, this is the lawyer's copy here. I have one in my office.

Q. You only brought one copy? A. That's right.

The Court: Do you want to see it? Let them see it will you please. Is that a photostatic copy of the original?

Mr. Ray: Original breakdown. It is not an original record. It was broken down and put on sheets

and photographed. In other words, your Honor, we had to go through—

The Court: Well I think counsel ought to be furnished a copy of any summary. I mean they didn't raise any question about her testifying as to what she done. I let it come on in, let her testify to it, but I think they are entitled to have this information so they can cross examine on it. As to what she did do, and how she proceeded.

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Mr. Ray: I assumed when they got the answers to interrogatories they had all the information they wanted.

The Court: I don't know what has gone on so far as any interrogatories or that part of it. I am just talking about what is going on here.

Mr. Ray: If your Honor please, I been in the case since, I believe, the 7th and I spent the entire time practically trying to get them this information.

The Court: All I am saying is I think since she has testified from the records which she herself has inspected and has come up with summaries here, I say that plaintiffs' counsel should be furnished copies of her summaries to that if they want to ask her what steps she took, how she arrived at figures she has there. I just wonder if you do have a copy available?

Mr. Ray: This is the only copy we have. They can have it as long as they want it.

The Court: You gentlemen need time to look at that? It's about time to recess anyway. We will just stop right here, 5:30, and we will continue the

trial of this case tomorrow. Before I say what time I would like to know how many more witnesses you have, Mr. Ray?

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Mr. Ray: Probably not over two, your Honor.

The Court: All right. Let's resume the trial of this case at 9:30 tomorrow morning then. At this time we will recess until 9:30 and if you gentlemen representing the plaintiff would like to inspect and study that summary which the witness has testified from, why I would direct that you have that opportunity tonight.

(The hearing recessed and reconvened April 5, 1966 at 9:45 A.M.)

The Court: I have just had a note handed to me and we have the privilege of having with us the members of the Senior Class in U. S. Government, of Aiken Senior High School. We are glad to have these students with us. We are in the process of having a class of non-jury trial in the Federal United States District Court of Aiken. In that situation the Judge serves as judge and jury, in that he passes upon and makes findings of fact as well as of law in the case. We are glad to have you with us as long as you care to stay. I would ask that you not leave while a witness is on the stand being examined. You are welcome to stay just as long as you care to. All

right, would you bring your witness back around so we could finish the cross examination please.

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(Merele Brigman resumed the stand, and Mr. Jenkins continued the cross examination.)

Q. Mrs. Brigman, will you state again what your position is with Piggie Park Enterprises? A. I am bookkeeper and buyer.

Q. And I believe you purchase the majority of the products used in your firm? A. That's right.

Q. And you have in your possession the records? A. Yes.

Q. You don't have them in your actual possession now do you? A. No, they are in my office.

Q. Do you know each firm with which your organization did business and has done business since July of 1964? A. Yes.

Q. And you know what was purchased from each of these firms? A. Yes.

Q. You made a statement yesterday with reference to the percentage of products and goods used by your organization that comes from South Carolina. You recall that? A. Yes.

Q. Will you state again what your figures were? A. I

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believe I said 75% of the food that we serve, food is processed and/or manufactured in South Carolina.

Q. And you would limit your remarks only to food? A. Food that we serve, yes.

Q. Food that you serve? A. Right.

Q. Now, you don't—you would not use those same figures would you, with reference to other things which are auxiliary to the service of food? A. No I would not.

Q. With reference to paper products, do you know how much paper products your outfit uses? A. Well I did not use paper products in that figure because I did not consider that a food item.

Q. Now, would you care to make a statement with reference to it, whether your paper products are from inside the state of South Carolina? A. We buy from Epps Fitzgerald, which I believe he testified yesterday how much of his product came from out of state, which I don't recall.

Q. You don't have any answer different from what was testified to yesterday? A. No I do not.

Q. I am interested in the use of your word processed in reference to food. Would you care to elaborate on that?

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A. Well processed, I mean made in ready to use form. Ready to cook, like a hamburger if it comes into a state as a cow, we could not serve it as such. It has to be processed into a patty.

Q. Then when you use the figure 75% of the food processed, you mean after the food gets into the state of South Carolina and whatever is done to it prior to its reaching your establishment? A. That's right.

Q. Your figure of 75% has nothing to do with where the food originally come from? A. Well the figure I arrived at was if it was processed or slaughtered in South Carolina.

Q. Where did you get your figures from? A. I don't understand that.

Q. How do you arrive at your figure of 75%? A. By adding all of my invoices up and taking the food items out and then determining if they are processed in South Carolina; and by processed, I called these people and ask these people when I buy from them if it is processed or grown in South Carolina.

Q. Do you go further and ask with references to say, let's say beef which is processed here, do you go further in your inquiry and determine where the beef comes from prior to its being processed in South Carolina? A. No I do not.

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Q. Do you have any figures with reference to how much beef used in your firm comes from other states, other than South Carolina? A. Unprocessed you mean?

Q. I am talking about how the food gets into the State of South Carolina. A. Do I have any figures?

Q. Yes. A. No I do not.

Q. So your figure of 75% does not apply to foods actually coming into the State of South Carolina does it? A. My figure applies to what we buy that is processed in South Carolina, or not processed in South Carolina. I have broken it down to out of state and in state.

Q. Can you be more specific and answer the question which I asked. Your figure of 75% does not reflect the amount of foodstuffs which you use which comes into the state of South Carloina from other states?

The Court: Let me ask you this question. Mr. Wilkerson on the stand yesterday of Greenwood Packing Company said a big part of hogs they bought were out of state, but they came into the state alive,

and after they purchased the live hogs that they slaughtered them and processed them in Greenwood.

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Now, did you include that?

A. Yes, sir. I included processed items.

The Court: In your 75%?

A. Yes, processed, I believe I stated. That is where I arrive at processed product, not the product before it is processed.

Q. So it is entirely possible that 100% of the meat which you use could come from out of the state of South Carolina where your figure refers only to that food which is actually processed here in South Carolina, even though it may have come from out of the state? A. You mean live?

Q. Yes. A. That's right.

The Court: You didn't count the live hogs that came in?

A. No.

The Court: If they came in live from out of state and were processed in the state you considered that as being food that was in state food so to speak?

A. That's right.

Q. And does that same answer apply to frozen food which comes into the state of South Carolina, but which is

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processed after reaching here? A. Well I can't recall any food we buy frozen. All the frozen food we buy, I put out of state, put it in the out of state figure.

Q. Do you know whether the food which is processed here may come into the state frozen? A. Well I have been informed by Greenwood Packing, and several, or most of our suppliers, that it is fresh and slaughtered in South Carolina. Now I believe Mr. McHugh from Dreher Packing Company testified yesterday that some of his may come in frozen, I am not sure on that. But I was informed by him when we started buying patties that his product was processed in South Carolina. The beef patty.

Q. Now, the question isn't whether it is processed here now, we are away from that. You have testified that you do not consider live products brought into South Carolina for slaughter and for further processing as being out of state meat. I am now asking with reference to meats which come into the state of South Carolina frozen, which are processed after they are here. You have no way of knowing—? A. No, I did not ask if they come in here frozen or fresh, no.

Q. So you have no way of knowing that? A. No. But, like I said, Greenwood Packing and several of our other suppliers have told me these livestock are slaughtered and processed. Slaughtered, I assume when they come in live.

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Q. You heard the testimony yesterday of several representatives from various meat packing plants who testified that their meat comes in, in large numbers frozen, did you hear that testimony? A. Like I said, I heard Mr. McHugh from Dreher Packing. Now on the others I didn't hear them say frozen. I heard them say buy livestock.

Q. Did you hear the testimony of Mr. Wilkerson of Greenwood Packing Plant? A. Yes, sir.

Merele Brigman—for Defendants—Cross

Q. Do you recall his testimony was that two-thirds of his products that are sold in South Carolina come from out of the state of South Carolina? A. Yes, sir. I didn't hear him say frozen.

Q. Do you have any figures which show the total amount of purchases by your firm during the year, fiscal year from June 1, 1965 to December 12, 1966? A. Do I have any figures?

Q. Yes. A. I believe that is them. All I have is what you have there.

Q. A summary of which I obtained from you yesterday? A. That's right.

Q. Do you know what is on it, or would you like to see?

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A. I don't remember every exact figure.

The Court: I believe she already testified that the fiscal year '64-65 that her firm bought $22,845 worth of merchandise. Is that merchandise, or—?

A. That is merchandise.

The Court: That is everything?

A. That's right.

The Court: And that from June 1st, 1965 through December 12, 1965, purchased merchandise totaling $122,724.13.

A. That's right.

The Court: That included everything?

A. That's right. But in breaking it down, my percentage, I only included food items, not the overall total.

Q. And breaking down your percentage then, Mrs. Brigman, you did not include purchases from Epps Fitzgerald Paper Company? A. No I did not.

Q. Those purchases were $6,478 during the six months period, is that correct? A. Yes.

Q. What did you buy from High Grade Foods? A. We buy pork.

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Q. Pork. How long have you been buying from them? A. We bought the last six months from them.

Q. Did you buy anything from High Grade a year ago? A. I don't recall right off, but it would be listed on there if we did. We started around last July.

Q. The purchases made from Pearce-Young-Angel was food? A. Yes, sir.

Q. You include that in your figure of 75% purchased inside, that is processed and manufactured inside the state of South Carolina? A. I put that in out of state, as he testified yesterday, most of his items are out of state.

Q. That is purchases $19,900 plus from them during this six months period? A. We buy quite a bit.

Q. Where did you put the Pepsi-Cola Bottling? A. In state. He testified yesterday his product was processed in South Carolina.

Q. He also testified yesteday that the major ingredients of his product is sugar and sirup and both of these almost 100% come outside the state of South Carolina? A. Yes.

Q. Yet when mixed with water after it gets here you say it is not interstate commerce? A. That's right.

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The Court: You didn't include that in your 75%?

A. Yes because it is a finished product in South Carolina.

The Court: I mean you considered that as in state products rather than out of state products?

A. Yes.

Q. Could your business successfully operate using nothing but food alone? A. Well, I don't know.

Q. As I understand you occupy a rather major position in your firm, is that correct? A. That's right.

Q. Would you consider your answer again. Can your firm successfully operate serving nothing but food alone? A. Well that is all we do serve.

Q. Using nothing but food alone? A. Oh, well no because we have to have electricity and anything it takes to run a business.

Q. Such as paper products essential to your business, is that correct? A. No, we could use China.

Q. But you know of any China manufactured in the

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State of South Carolina? A. No, but we could reuse it and it would cut the cost.

Q. The fact is you do not use China? A. We do in Little Joe establishment downtown.

Q. Is not the volume of business done in the Little Joe establishment downtown a minor part of your business? A. Well, it is not the major.

Q. In fact is the minor portion isn't it? A. Well, yes.

Q. And a real small portion of that, isn't it? A. No, it is about a fifth.

Q. About one-fifth and the other places you do not use China, you use paper products? A. That's right.

Q. Bought primarily from Epps Fitzgerald? A. That's right.

Q. As your other business are operated other than Little Joe, as they are presently operated, could they operate without the use of paper products? A. Well, it would be hard.

Q. Is hard synonymous with impossible? A. Well I would not say impossible.

Mr. Jenkins: Will you indulge me a moment, your Honor?

Q. Bruce's Foods is a supplier, is that correct? A. That's

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right.

Q. What is Bruce's Food Supply Company use? A. Hot sauce.

Q. Did you include that in your 25% outside the State of South Carolina? A. 25%, no I included that in the 75%.

Q. I would like to know where is Bruce's sauces made? A. I believe that came from Liberia.

Q. That is in Louisiana? A. Right.

Q. You say you include that in your 75% of being produced or processed inside of South Carolina? A. Well that is because we do not serve hot sauce. We use hot sauce to process an item that we sell, so we do not serve hot sauce.

Merele Brigman—for Defendants—Cross

Q. Could you explain that without giving away a trade secret? A. I don't know the trade secret so I could explain.

The Court: How do you get the sauce off the meat before you serve it or before you sell it?

A. It isn't sauce on the meat, not as hot sauce no. It would not be a Piggie Park sauce until it is processed locally at our company.

Q. I see. A. We don't serve hot sauce.

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Q. I see. You have some special recipe that is called Piggie Park? A. That's right.

Q. The ingredients that go into that special sauce come from outside the state of South Carolina? A. That's right.

Q. You merely put them together here? A. That's right.

Q. And you put in that same category, don't you, meats which come outside of South Carolina, but which are put together here? A. I am sorry.

Q. You put into the same category with the sauces meats which come into the State of South Carolina from other states, but which are put into some form here and come over to your place from South Carolina? A. That's right, processed.

Q. Now, you have been buying from Bruce's for how long? A. Well, as you can notice that figure, we don't buy too much from them, but the last several years.

Q. Several years? A. Yes.

Q. Now, Dubouy Chemicals, what you purchase from them? A. Soap.

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Q. What is soap used for? A. Scrub the floor.

Q. That is in your business? A. That's right.

Q. Wash dishes with it too? A. No, we don't use dishes.

Q. Well downtown? A. We don't use that soap.

Q. I see.

The Court: You do wash those dishes though?

A. Oh yes.

Q. You purchase hamburger from K-Mart? A. Yes.

Q. Do you know where those hamburgers come from? A. I am sorry, it is not hamburger, it is hamburger meat.

Q. Well you purchase this merely says hamburger, you purchase hamburger meat from K-Mart? A. That's right.

Q. You don't know where that meat comes from, do you? A. Well they grind it down there themselves, but we don't buy it—we process chili out of it. We make chili.

Q. So whatever the amount is, you include that also in

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in-state? A. Yes, for the simple reason they process at K-Mart then we bring it up to Piggie Park and process it into chili.

Q. You don't know where it comes from before it gets to K-Mart? A. No.

Q. You do know the K-Mart is a chain outfit, headquarters not in South Carolina? A. That's right.

Q. Harvin Packing, where is Harvin? A. Sumter, South Carolina.

Q. So we will assume then the mere small amount of purchases from Harvin would be included in the 75%? A. That's right.

Q. What do you buy from Pearce-Young-Angel? A. We buy produce, French fries, shrimp, fish, mustard, mayonnaise, salt.

Q. You purchased, if I may, the last six months; purchases amount to $19,967, is that correct? A. Yes, if that is what I have there.

Q. I am reading from your figure. A. Yes.

Q. How much of this foodstuff comes from outside the State of South Carolina? A. Well, I put it all in out of state except the mayonnaise.

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Q. How much mayonnaise did you buy during the last six months? A. Well we buy some from P. Y. A. and some from Thomas & Howard. We average about twenty-five cases every three weeks, and that mayonnaise is made in South Carolina.

Q. Cost how much approximately? A. Well, when we buy from P. Y. A. $6.45 a case, and now buying from Thomas & Howard, which is C. H. Sour Company, and $6.09 a case. And that is made in Greenville, C. H. Sour and Wood Brothers in West Columbia from P. Y. A.

Q. That is mayonnaise? A. Right.

Q. What are the ingredients in mayonnaise? A. Egg yolks is a good item for it, I don't know what else is in it.

Q. You made above $10,000 purchases from Thomas & Howard during that same six months period, how much of that did you include in your 25% out of state? A. Well a lot of it. Out of state?

Q. Yes. A. Oh, not too much.

Q. What do you buy from Thomas & Howard? A. We buy mustard and some mayonnaise, as I mentioned, and

Worcestershire sauce, and vinegar, and our cleaning items

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except that soap.

Q. Looking at your list, you have purchases amounting to approximately $25,000 which you only indicate by calling petty cash, PP 1 and something else. Explain what that means? A. Well each drive-in has three or four hundred dollars ready cash on hand, and from that money they buy bread, which is Palmetto Baking Company made in Orangeburg, South Carolina; milk, which is Coble Dairy, milk from the cows in Florence, South Carolina; and chickens, which we buy from Southeastern Poultry, which is South Carolina, and which is South Carolina grown; and now was that the total twenty-five in the first column?

Q. Well, I ran up a rough total. A. See, I have that broken down. Some of the money is spent on other items, but I did not include in food because all my petty cash I have broken down each item.

Q. Would that be a figure under the extreme right? A. Where I said, bread, milk and chickens.

Q. Yes. A. That's right.

Mr. Jenkins: No further questions.

The Court: I would like to ask one question. When you got up your percentages, you said you only considered foods served by your company. Did

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you do that on your own, or did you consider foods upon the advice of your counsel?

A. Upon advice of my counsel.

Merele Brigman—for Defendants—Redirect

The Court: He told you only to consider the foods that were served?

A. Well, that's right.

The Court: He told you not to consider such items as paper cups, paper plates, napkins, and that kind of thing?

A. Paper items, yes.

The Court: All right.

Redirect Examination by Mr. Ray:

Q. From these items you also excluded hickory wood and things like that? A. Yes.

Q. With reference to Bruce's Foods in '63-64, '64-65, and '65-66, what was the dollar amounts that are shown on there? A. On Bruce's Food, '64-65, $183.75.

Q. $193.75? A. $183.75.

Q. All right. A. And June through December of '65 was $287.50.

Q. I hand you some papers there, and do you recognize

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those papers? A. Yes, sir.

Q. And how were they compiled? A. Well I did this from this breakdown I have here. This was food; this was just the food. That includes everything we bought, and this is just the food.

Q. Just the food items, and at whose direction did you prepare it? A. Mr. Ray's.

Merele Brigman—for Defendants—Redirect

Q. Is that me? A. Right.

Q. And was I present when it was prepared? A. Yes.

Q. And what categories were the items on there divided into? A. Out of—processed out of state, and processed in state.

Q. And did those items include anything except food? A. No.

Q. In food I mean, items to eat? A. That's right, items to eat, except beer.

Q. Was beer included? A. Yes.

Q. How about tea, coffee, and things of that nature? A. Yes.

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The Court: Mr. Ray, I would like to get your position straight on one point. Is it your position that foodstuff which originate out of state, and subsequently brought into the state and are processed in some manner within the state then should be considered for the purpose of this action as food that has not moved in interstate commerce?

Mr. Ray: Not exactly the way you said it, your Honor. When something comes in broken down into a lot of raw ingredients, like salt and pepper goes into sausage, it is not a food item. The food item, we maintain, has not moved in interstate commerce if it is manufactured and made into something special; and, of course, live hogs and live cows we maintain until they are food items, and until they are killed they are not edible, and there are decisions we think hold that until it becomes recognizable food, you would pick up and eat, or at least to some

degree, there it is not food, under the definition and decisions concerning food. And, of course, for the same reason we don't feel paper plates are food items.

The Court: It is not food, but the statute specifically says, speaking of restaurants, it serves or offers to serve interstate travelers, or a substantial

portion of the food which it serves or other products which it sells has moved in commerce.

Mr. Ray: That's right, sir. We maintain, of course, it don't sell paper plates.

The Court: You sell food and giving the plate and giving the cup?

Mr. Ray: Yes, sir.

The Court: So you are not actually selling the cup?

Mr. Ray: No, sir. If we were selling cups, we'd set cups up and sell them, I mean as an item. But that is not the man's business. His business is serving food.

The Court: Well, is the cost of the cup figured into the cost of the Pepsi-Cola sold?

Mr. Ray: If your Honor please, you would have to ask her because I don't know the answer to that. Your Honor, I have here, I would like to introduce it in evidence—

The Court: You don't show it to me; show it to counsel. You have any objection?

Mr. Perry: Yes, your Honor, we do.

The Court: State the grounds of your objection.

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Mr. Perry: May it please the Court, we object to this evidence upon the ground that it constitutes a self-serving declaration, and has no probative value to these proceedings. We submit that the defendant has the opportunity to bring these suppliers into court, just as the plaintiffs have done, and the entries into the defendant's bookkeeping system would not constitute the best evidence in this particular respect, and more over appears these entries constitute excerpts from the defendants' records. They do not constitute the entire books and records of accounts, but rather they constitute excerpts and as such the original records themselves, if any records would be of pertinency to these proceedings, then of course the original records would be the best evidence and not excerpts from them. For all these reasons we submit that the evidence is inadmissible.

The Court: All right, Mr. Ray?

Mr. Ray: If your Honor please, that is a compilation of what she already testified to on the stand; and for the court to—I intend to introduce this too, the breakdown here, but it is unintelligible, as a matter of fact it would be unintelligible to them without her to explain it. And she testified to everything on here and these figures that we have given are in

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accord with the evidence that he has introduced himself, and merely total it up for the convenience of the court.

The Court: Well, of course, that is very fine, and I would have no hesitancy of permitting in evidence a summary of records which were before the court, but you don't have your records here.

Mr. Ray: If your Honor please, all of this was—

The Court: That is strictly a compilation too. I am talking about original records. If you had the records here—if this is introduced, would your records from which this is made be available?

Mr. Ray: Yes, sir.

The Court: All right. On that basis I will let it in. They say their records will be made fully available to you.

Mr. Ray: If your Honor please, we have not intended—

The Court: Here, mark this in evidence.

Mr. Ray: To clarify our position of my client with the court, last Monday when we were up arguing this I told him any information he wanted he could have.

The Court: What I am saying is ordinarily I wouldn't permit any summary of records which are not before the court in evidence. I mean in order

to facilitate the trial, I would surely permit a summary of records which were produced before the court. Based on your statement that the defendants records will be made fully available to plaintiffs' counsel if they care to see them, I will let this summary in.

Mr. Ray: All right. Could I say one more thing in that connection?

The Court: I haven't cut you off.

Mr. Ray: All right, sir. Insofar as these items are concerned, and the amounts, we take the position that certain of them legally have not moved in commerce, and that is simply we don't deny everything he bought, or anything that he bought, or who he has bought it from. And, of course, I am assuming that the invoices that were introduced yesterday, and I believe yesterday I said we would probably be better off just bringing the books up here than try to copy and possibly incur such a terrible expense as 50¢ per page for all the ledger sheets. We are not trying to keep the evidence from before the court. We feel—

The Court: I made no insinuation or intimation that you were trying to cover up anything. I am merely ruling on an offered exhibit, and I said I would let it in under certain conditions.

Mr. Ray: Yesterday I didn't feel that without you

knowing the total thing, and having some volume to measure this by what is substantial and what is not substantial, that is why these things are being brought in. Just a pile of foods, you don't have anything to measure it by.

Q. Could I hold this back a minute please maam. On what I have here marked Defendants' Exhibit E, Mrs. Brigman, items that were not food, were not included in arriving at these percentages? A. That's right.

Merele Brigman—for Defendants—Redirect

Q. All right, maam, now also included in out of state purchases were merchandise that we learned yesterday were in state items, such as produce from Pearce-Young-Angel, is that correct? A. Produce from Pearce-Young-Angel.

Q. Epps Fitzgerald? A. We don't have Epps Fitzgerald included.

Q. That's right, but we learned yesterday was a part of that made in the State of South Carolina? A. That is what Mr. Hill testified to yesterday.

Mr. Ray: I believe, counsel, we want to get that in there. We are not trying to hide anything. Mark this too please maam. If your Honor please, I marked these three sheets as an exhibit.

The Court: Any objection to that?

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Mr. Perry: Of course we stick with our main objection, your Honor, but we do adhere to your Honor's ruling.

Mr. Ray: It is on the same basis. The books and figures will be available, any figure they question or want to look at.

The Court: I might comment that plaintiffs counsel permitted an examination from that without any objection, and you cross examined without any objection, so I think actually your objection to that would come pretty late.

Mr. Perry: Yes, sir, your Honor. I am sure that is correct.

The Court: In any event I will let it in.

(Received a newspaper ad and marked as Defendants' Exhibit G.)

Q. Do you recognize this, Mrs. Brigman? A. Yes. That is the ad we run in the State and Record.

The Court: Do you have any objection to that?

Mr. Perry: None.

The Court: Without objection that will be received.

Q. Mrs. Brigman, in connection with that ad, is this ad from two or three years ago? A. No, sir.

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Q. Approximately how old is that ad? A. We started running that particular ad about the first of March.

Q. And is it typical of the ads that you have run? A. Yes, except the size is larger.

Q. Except what, maam? A. The size of the ad.

Q. Does this ad have any reference whatever to interstate travelers? A. Yes, it says on the bottom, we do not serve interstate travelers.

Q. Does it have any reference to Negroes? A. No it does not.

Q. Why does it not, why haven't you made reference to that? A. Well we have tried to put that in our ad, but the paper refuses to print it.

Q. And that is the reason it—is that the reason it is not run there?

The Court: What was the reason?

Q. The paper will not put it on, there. Some law with reference to it, your Honor. A. Yes.

Q. Mrs. Brigman, I hand you a handful of papers here

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and ask you if you recognize those? A. Yes, sir.

Q. And are they part of the records of Piggie Park Enterprises? A. Yes, sir.

Q. And what are they? A. These are void tickets.

Q. For what period? A. For the last four weeks.

Mr. Ray: If your Honor please, we are going to offer these things here to see if counsel has objection.

The Court: All right.

Mr. Ray: I suppose if you staple them at one corner, we might get them all in one.

The Court: Any objection to these?

Mr. Perry: For whatever they are worth, your Honor, we have no objection.

(Received the tickets described and marked as Defendants Exhibit H.)

The Court: Are you qualifying your objection?

Mr. Perry: No, your Honor.

Q. Mrs. Brigman, yesterday you were asked the question concerning why you didn't have these tickets. Now,

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are these a part of your records that you were testifying to yesterday? A. Yes.

Q. Are they records concerning—what are they records of? A. These are void tickets, I mentioned yesterday.

Q. Would you speak up? A. These are in reference to the void tickets that I mentioned yesterday on how if we have an error in a ticket that has already been rung up, we have to subtract from our daily total, and this is the record that I have to certify that void ticket.

Q. In other words to show why it was not included in your cash when you make out your tax return at the end of the year, is that right? A. That's right, and show why the money was not deposited in the bank.

Q. And does these tickets have on them the reason they were voided? A. Yes.

Q. Do you write that on there? A. No, the manager of each Piggie Park writes the reason, and it has to be signed by the girl that it is rung up on, by the girl I mean the curb girls. Our curb girls are numbered, and each ticket

is run up on the girl and she has to certify the reason that the manager wrote back her.

Q. All right, what else are these tickets used for besides, do these tickets have any purpose in the business besides showing what was ordered? A. These particular tickets?

Q. All of them tickets as a whole, do they show any other purpose in the business, do they serve any other purpose in the business? A. Well, this is what we write our order on, and the amount of purchases on the tickets, and it has the girl's number, and the green copy we give to the customer and we keep the duplicate copy.

Q. Does it show whether the sale was made outside or inside? A. Yes, sir.

Q. What would that mean? A. The station number up in the lefthand corner of the ticket, it has the station number, by that, that is the number on the telatray outside on the parking lot.

Q. If it has inside, what does that mean? A. It means the customer came inside and ordered.

Q. And did not order through the telatray? A. That's right.

Q. Would you tell us what reasons appear on those typi-

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cal tickets as a reason for voiding? A. This first one says party was from Georgia, and it is signed by Doris Mills and Carol Russell.

Q. All right, would you look at another one. A. This one says, party was from Tennessee, did not know this until order was taken.

Q. Would you look at another one? A. This one says, party ordered one-fourth fried chicken, not four orders of fried chicken, am voiding $1.80 from three, was able to use chicken, Doris Mills and the curb girl.

Q. Would you read another one? A. Party would not pick up order at back door.

Q. Did it say anything else on there? A. No.

Q. All right, would you turn to another one? A. This one said, colored people, and signed by the manager and curb girl. This one said, left curb just time the order was placed. Colored man in the car and from out of state. This one says, car from Georgia. This one said, people had colored person in car and didn't want to take order to go, no new ticket. This one has—

Merele Brigman—for Defendants—Redirect

Q. Well never mind. Go ahead. A. Party was colored, would not pick—would not come to back door for order. Party was colored, would not pick up order at back door.

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Party wanted one-half fried, not special.

Q. What does that mean? A. Yes, sir, whoever took the order over the telatray misunderstood the party apparently. They wanted two half fried chickens, and not two quarter fries, and therefore they had already rung it up and made an error; they voided the ticket. Car from North Carolina. Car was from Georgia. Order picked up at Two Knots Road. This was a phone order and the person called Number Two Drive-in and went to Number Three and picked it up.

Q. Mrs. Brigman, when you order food from these various people, order meat products and things of that nature, have you made a specific effort to inquire whether these products were South Carolina products or not? A. Yes, sir.

Q. With reference to Greenwood Packing Company, had you asked them or inquired of them when you ordered—

Mr. Perry: Your Honor, pardon me please. I apologize for not waiting until he concluded the question, your Honor, but the way it began it was obviously leading and I thought I ought to interpose an objection on the ground it is phrased as a leading question.

The Court: All right. Restate your question.

Merele Brigman—for Defendants—Recross

Q. With reference to Greenwood Packing Company have

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you ever had any occasion to call them? A. Yes, sir, we buy from Greenwood Packing Company.

Q. And what was the nature of your inquiry of them? A. Well I have repeatedly asked them are their shoulders, or their meat product that we buy from them processed in South Carolina. They have told me it is slaughtered and processed in their Greenwood Packing Plant in Greenwood, South Carolina.

Q. Do you also buy from High Grade foods? A. Yes, sir, we do.

Q. Would the same thing apply to High Grade Foods? A. Yes, they have told me that all their meat that we buy from them is slaughtered and processed in Orangeburg, at their slaughtering house.

Q. How about Southeastern Poultry, do you buy from them? A. Yes we do, we buy chickens.

Q. Where is their main place of business, where do you order from? A. I order from the plant on Sunset Blvd. in West Columbia.

Mr. Ray: I have nothing further of this witness, your Honor.

Recross Examination by Mr. Jenkins:

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Q. Mrs. Brigman, will you look at this ticket. Will you read it please? A. People had colored person in car and didn't want to take order to go, no new ticket.

Q. Does that mean to you that there were persons in the car other than the Negro? A. Well it could be interpreted that way.

Merele Brigman—for Defendants—Recross

Q. What is the policy of your company with reference to Negro and whites in the same car as those persons apparently were? A. We do not serve them.

Q. Don't serve any of them under that circumstance? A. No.

Q. Is that only because of the presence of the Negro? A. That's right.

Q. That is correct? A. Yes.

Q. Mrs. Brigman, despite your inquiries made of Greenwood Packing Plant with reference to where their meat is processed, you heard the testimony on yesterday as to where 66% of that meat comes from did you not? A. Yes.

Q. That was from out of the state of South Carolina? A. I believe that is what he said.

Q. I am interested in knowing when did you begin mak-

ing inquiries of your suppliers as to where their products are processed? A. When this Civil Rights Bill was passed.

Q. Before that time you weren't interested? A. Well we tried to limit our purchases to South Carolina.

Q. How long, Mrs. Brigman, did you say you have worked for Piggie Park Enterprises? A. March of '64.

Q. March of '64? A. That's right.

Q. Your use of the word processed rather intrigues me. Suppose you were in Georgia and have a Ford automobile that is assembled in Atlanta, the steel came from Pittsburg, and rubber came from Ohio, and paint and the lacquer came from Minnesota, and nylon came from North Carolina. It came in as parts, but the final assembly of that car was in Atlanta, and the car was sold in Columbus,

Georgia. What is your interpretation with reference to whether that is interstate commerce?

The Court: I don't think I would force her to answer that. I didn't hear her say she was a law graduate and ever studied law, and I think that is getting outside the field this witness ought to be called upon to answer.

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Mr. Jenkins: I was just wondering if the person that gave her—

The Court: The person that gave her instructions is not on the stand, and I don't want to place this witness in the position of answering a hypertechnical question the Court would have to pass on.

Mr. Jenkins: We are not going to pursue it.

The Court: I am sure you are not because I told you not to.

Mr. Jenkins: No further questions.

The Court: You have anything further? I want to ask this witness, I notice according to your ad you have three drive-in restaurants in the Columbia area.

A. That's right.

The Court: All are located on main highway?

A. Yes.

The Court: Columbia Highway, Charleston Highway, Sumter Highway, and some other highway

listed in your ad, and your Little Joe Sandwich Shop in the 1400 block of Main Street.

A. Yes.

The Court: How far out is that?

A. How far is that 1400? It is about three blocks down

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from the State House.

The Court: It is on Main Street of Columbia?

A. Yes.

The Court: Now, when a person drives up to one of your drive-in restaurants, ~~the~~ way it is operated today and has been operated for the last several months, you do not have a curb girl to go to the car to take an order, do you?

A. No, sir.

The Court: You push a button that registers on a switchboard of some kind on the inside of the restaurant?

A. That's right.

The Court: Then someone there through the microphone says, order please?

A. That's right.

The Court: And the person sitting in the car very likely is not even seen by the person taking the order?

A. Not unless he was seen when the car drove in.

The Court: But you don't make any special effort to see whose in the car, whether colored or white person, or whether it is South Carolina license, or Georgia license when the car drives up, is that right?

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A. Yes, sir, that's right except, like I say, if they happen to see.

The Court: Well if they happen to drive out in full view, if you look you might see, but you don't make any extra effort to see whether it is white or colored person, or South Carolina license or Georgia, or North Carolina license?

A. No extra effort.

The Court: When you ask for their order, do you, or do you not, ask them what state they are from?

A. No.

The Court: You make no inquiry?

A. Not through the telatray, no, sir.

The Court: You take the order, go ahead and prepare it, then if your waitress takes the order out,

after the hamburger, barbecue sandwich or chocolate milk shake you get it on the tray, if she takes it out there and sees a North Carolina license, then what does she do?

A. Well they have instructions to refuse service.

The Court: Just the license itself. You don't make any inquiry of the individual?

A. No, sir.

The Court: But if you see an out of state license

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on the car you just take it back?

A. Well no, sir. We have them to ask them if they are passing through, or if they are living in Columbia.

The Court: That is after they see the out of state license. If it is South Carolina license though no inquiry at all is made?

A. No, sir.

The Court: Now, this sign in which you have posted, according to the pictures in evidence, says we do not serve interstate travelers. That is located on one side of the drive-in isn't it?

A. It is in the front window.

Merele Brigman—for Defendants—Recross

The Court: If you happen to drive in from the other side, you wouldn't see that would you?

A. No, sir, not likely.

The Court: Do you have any policy of making any inquiry or any determination before you accept an order as to whether a person is intrastate traveler, or interstate traveler?

A. Only like I said yesterday, if the curb girl, you know they are in and out all the time on the curb, they will come in and say that car that just drove up was from out of state. Then when they mash the button, the telatray operator will say I am sorry we do not serve interstate

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travelers.

The Court: Do you ever ask them to show a driver's license, registration of the car or anything like that?

A. No.

The Court: All right. You may step down.

Mr. Ray: If your Honor please, I'd like to call Mr. Shealy.

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Mr. Ray: If your Honor please, I would like to call Miss Jemell Richardson.

JEMELL RICHARDSON, called as a witness in behalf of the Defendants, who being first duly sworn, testified as follows:

Direct Examination by Mr. Ray:

Q. Your name is Miss Jamell Richardson? A. Yes, sir.

Q. Where do you live? A. 2208 Irvin, Columbia, South Carolina.

Q. How long have you lived there? A. Five years.

Q. And by whom are you employed? A. Piggie Park Enterprises.

Q. And prior to that, by whom were you employed? A. Before Piggie Park, Walgreen Drugs.

Q. And before that? A. F. W. Woolworth.

Q. What period of time would that cover? A. Woolworth would cover '63 and '64; Walgreen's would cover '64 and the middle part of '65.

Q. And you are presently employed by Piggie Park En-

terprises? A. Yes, sir.

Q. In the course of your employment what do you do? A. I am a curb girl now.

Q. And have you so been employed since you worked for Piggie Park Enterprises? A. No, sir.

Q. What was your other type of work? A. I was manager of Walgreen's Drugs.

Q. No, at Piggie Park. A. Repeat the question.

Q. What jobs have you had while you were working at Piggie Park? A. Curb girl.

Q. And during the course of your employment, have you received instructions about who to serve and who not to serve? A. Yes, sir.

Q. Do you, as a condition of your employment, are you required to serve any particular person? A. No, sir.

Q. Who have you been instructed to serve and not instructed— A. We are not allowed to serve interstate travelers.

Q. Have you ever refused service to interstate travelers?

A. Yes, sir, I have.

Q. How do you determine if a person is interstate? A. If we don't catch them before I wait until I go out to the car. I already have the order and I ask the people are they out of state, I say are you living here or visiting. If they say visiting, I say we are sorry we are not allowed to serve them.

The Court: That is only if you see an out of state license?

A. Yes, sir.

The Court: You make no inquiry if it is South Carolina license?

A. No, sir.

Q. Now; when a person—do you have any other instructions about serving people? A. Yes, sir. All colored are supposed to come to the side entrance and to the kitchen.

Q. Would you tell us what the kitchen is? A. The kitchen is the part where all the food is prepared.

Q. Does the kitchen in fact occupy the entire building? A. Yes, sir, it does.

Q. Then if anyone went in the building on the place, they

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would enter the kitchen? A. Right.

Q. And where, what Piggie Park are you employed at? A. Piggie Park No. 1, Charleston Highway.

Q. Is that— A. Columbia, South Carolina.

Q. West Columbia, South Carolina? A. Yes, sir.

Q. Have you ever refused service to a colored person? A. Yes, sir, I have.

Q. Have you ever refused service to an interstate traveler? A. Yes, sir, I have.

Q. Have you ever refused service to anyone else? A. Yes, sir, I have.

Q. Would you tell us who they were? A. They were people that would come up in the cars with colored people, with colored people in the car with them.

Q. You would not serve them? A. No, sir.

Q. Even if they were white? A. Even if they were white.

Q. Have you refused service to any other person?

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The Court: You don't always follow that practice do you? I stopped there several times with my chauffeur driving with me, and I been served there and he's colored and I'm white.

Jemell Richardson—for Defendants—Direct

Q. Have you served—? A. I never have.

The Court: We both been served without any question.

Mr. Ray: You sir, are a United States District Judge, and I think maybe we made some exception there.

The Court: I don't think anyone knew that fact.

Mr. Ray: I'm sure they didn't.

The Court: Probably if they did, maybe I'd have been a little dubious about eating the food.

Q. Have you ever seen Judge Simons before today? A. No, sir, I have not.

Q. Then you never served a car in which he was sitting? A. No, sir, I have not.

Q. At least you don't recollect having done so.

The Court: I don't know whether to take that as a compliment, how do I know she would remember me out of hundreds of people she served?

Q. Has there ever been any other people, types of peo-

ple, or any other conditions that you refused service? A. We usually cater to just family trade.

Q. Have you refused service to any other types of people? A. No, sir.

(Counsel approached the bench for a brief conference.)

Jemell Richardson—for Defendants—Direct

Q. Mrs. Richardson, if as a condition of your employment you were required to serve colored people, would you —what would you do? A. I would quit.

Q. Have you ever in the past done such? A. No, sir, I have not.

Q. Have you ever quit a job? A. Yes, sir, I have.

Q. For that reason? A. Yes, sir, I have.

Q. Where? A. I quit F. W. Woolworth and Walgreen Drugs.

The Court: Those establishments haven't closed down because you quit though have they?

A. No, sir, they are still in operation, except Walgreen's they no longer have a fountain.

The Court: At this time I would like to announce that we have the honor of having one of distin-

guished colleagues from the State of West Virginia in the Court with me, Hon. John Fields, U. S. District Court from Charleston, West Virginia. Judge, would you stand up please. Sure delighted to have you with us. At this time we will take a short recess.

(A brief recess was taken and the hearing reconvened.)

The Court: You have any cross examination of this witness?

Mr. Perry: Just one.

Cross Examination by Mr. Perry:

Q. Young lady, you, in following the customs which you outlined a moment ago, you are merely carrying out the policies of your employer, aren't you? A. No, sir, I am not.

Q. Well of course, you obviously would not be working for them if it were not for the employer's policy? A. That's right.

Q. So if the employer's policy were otherwise— A. I would discontinue my service.

Q. So it is his policy you are enforcing? A. Yes, sir.

Mr. Ray: Come down.

The Court: Step down.

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Mr. Ray: If your Honor please, I have another witness that works for Mr. Bessinger, Jean Lee, and by agreement of counsel we would like to stipulate—

The Court: J-e-a-n Lee?

Mr. Ray: Yes, sir. That her testimony would be identical with that of Jemell Richardson, the previous witness. By stipulation agreement of counsel.

The Court: Do I understand you, Mr. Perry, on behalf of plaintiffs agree to stipulate to that?

Mr. Perry: Yes, your Honor.

The Court: You care to have any cross examination?

Mr. Perry: None is perceived to be necessary.

Mr. Ray: If your Honor please, could I have just a second?

The Court: You need the help of the Marshal?

Mr. Ray: Yes, sir. She's gone to get him. (Mr. Bessinger was absent since the recess.) If your Honor please, would it be possible for us to enter the Court's experience at Piggie Park with relation to service to the colored driver in the car as part of our case?

The Court: Well I don't think I want to be a witness in the case.

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Mr. Ray: I was thinking perhaps counsel would agree without any questions—

The Court: Well, of course, I am the one that gave the order and received the food, but he had on a chauffeur's cap and I assume that might have made some difference.

Mr. Ray: Mr. Bessinger, I would like to call as a witness.

The Court: Do I understand this is your last witness?

Mr. Ray: Yes, sir. I don't anticipate any further witness.

L. MAURICE BESSINGER, called as a witness in his own behalf, who being first duly sworn, testified as follows:

Direct Examination by Mr. Ray:

Q. Your name is L. Maurice Bessinger? A. Yes, sir.

Q. And are you the majority stockholder and general manager of Piggie Park Enterprises? A. Yes.

Q. And you are the defendant, one of the defendants named in this case? A. Yes.

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Q. Where are you from, Mr. Bessinger? A. Columbia.

Q. And how long have you resided in Columbia? A. I been living in the Greater Columbia Area since 1955.

Q. How long have you been in business in the Columbia area? A. In that same period of time.

Q. And has your business during this period of time always been the same type of business? A. Yes, sir.

Q. And by type, what do you mean? A. Well I am a pioneer in South Carolina in what I call the drive-in barbecue business.

Q. Is that to say there were no barbecue drive-ins before you opened up? A. I opened the first place of busines of mine in '53, and at that time in Charleston, and at that time I don't know of any exclusive barbecue drive-in operation like I have implemented and ran. As I said, I think I am a pioneer in that type business.

Q. Has the business that you run now always been operated in the same manner? A. Yes, sir. Of course we try to improve.

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Q. And by improve— A. But the basic operation is the same that I invisioned when I opened up in '53.

Q. And in so far as the drive-ins are concerned, Mr. Bessinger, were they—did you have any purpose in mind when you opened them up, or when you—? A. Yes, sir.

Q. Developed the business? A. Well I used to be in

business with my father. I used to work for my father, he ran a general restaurant.

Q. By general restaurant you mean what? A. I mean offering dining room facilities, facilities that encourage eating on the premises and making it comfortable for on the premises eating. And then after going into the service and coming out, as I said, I invisioned a new type of food service industry, and I so set out to promote this type of business which calls for exclusive driving operation more or less, and the purpose of this is to make a greater profit and do a greater sales and make a greater profit whenever you can turn over your customers much faster in drive-in operation.

Q. How is your drive-in operation designed to accomplish that? A. First of all you start with a basic building, which is for all practical purposes, it hardly has any parti-

tions, it's one building with four walls, and it is one big kitchen. The entire building is a big kitchen, and then you try to have ample parking stations outside for your customers to drive up and get their orders as quickly as you can. The whole thing is based on speed and carry out.

Q. And what implements to carry out business do you use, if any? A. I don't exactly understand.

Q. How do you implement or accomplish the carry out business? A. Well we have this electronic ordering service, we had this about three years. This in itself helps to speed up service because of the increasing labor problem in our type business. The customer drives up, he pushes

the button he orders, and when the hostess carries the order out and everything is on paper too.

Q. Is it ready to go? A. Yes, it is ready to go, all orders are ready to go when they go outside the building. The girl hands the order to the customer, she collects for it, she tells them thank you, sir, and—

Q. Does she leave a tray with them? A. No she does not leave a tray.

Q. Does she return to the automobile to see how they are

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getting along? A. No she does not return to the automobile. As far as she is concerned she has her money. In the event the customer wants to stay and eat his food and wants something else, he of course pushes the button again.

Q. Would you prefer that a customer stay and eat? A. No.

Q. How would this affect your business? A. No, we try to encourage customers picking up and going because that parking space is valuable and we don't serve other things. We don't serve some things that would tend to keep the customer on the lot longer. We cater to the family type people that would come in and get this good food and go. We don't cater to teenagers. We ran this experiment on selling beer, but we found you can't get the teenage business and family, you got to take your pick on that. So all that, what I am saying is means we try to encourage the customers to come place their order and get on as fast as they can make room.

The Court: You don't have any signs asking people to move on as soon as they been served?

A. No, sir.

The Court: The waitresses don't suggest that either do they?

A. Oh no, sir. We don't do that, but we try to make it convenient for them to leave the minute they get their order.

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The Court: As soon as you get the money you're ready for them to go?

A. Yes, sir. We are as a matter of fact.

Q. In that connection is there any music furnished at your drive-ins? A. No, sir. We don't furnish any music for the simple reason that it has a tendency to make customers stay longer and, of course, we discourage that.

Q. Have you experimented with this type of thing in your restaurant business? A. Well I been in the restaurant business for twenty-six years. I owned my own restaurant since 1953, own drive-in barbecue operation. I was in the restaurant business with my father, then I opened this special drive-in barbecue operation in '53 and that's been what —thirteen years.

Q. Did you have music when you opened that one? A. No, sir.

Q. Did you sell beer when you opened that one? A. The first one?

Q. Yes, sir. A. No, sir.

Q. The beer was an experiment that lasted how long? A. I think it lasted about a year or a year and a half. It was a complete flop.

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Q. When your food is served then it is served in what type of utensils at the drive-ins? A. Well it is put on paper.

Q. Put on paper, you mean what? A. Well I mean we have what you call a wax paper that we put the sandwich on, if they want a barbecue plate, it is put on a paper plate, carry out plate.

Q. Is it designed for what is it designed, that type of thing designed with reference to your business? A. The paper?

Q. Yes. A. It is designed for them to carry home. I mean the paper itself is designed for them to eat up the road, back at the office, carry back home, or what have you. I mean that is the reason—

The Court: Don't you serve, or do you serve cloth napkins with some of your orders?

A. With some of them.

The Court: You don't expect your customer to ride off with the cloth napkins?

A. We have a stainless steel stand on the telatray, and if they leave, why the girls bring the napkins back.

The Court: The point I am making, when you use cloth napkins in your service, you expect people to stay there and finish eating before they leave, do you

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not, because if not why they couldn't make very good use of the napkins unless they took them with them.

A. As a matter of fact, your Honor, this is another trade secret, but we don't mind them carrying the napkins home because they think they are getting more than they paid for.

The Court: Well I have never taken none of your napkins home, but your cloth napkins if you're saying I'm supposed to take it, I will do that next time.

A. I am not saying it is a promotional gimmick.

The Court: In other words you don't object to someone taking them?

A. No, sir.

The Court: You wouldn't consider someone had stolen something from you if they took a cloth napkin?

A. No, sir. We certainly don't, we get them at such a reasonable price. It is promotional, the customer thinks he got more than his money's worth, and he comes back more often.

The Court: He might have a guilty conscience if he has taken something of value from you.

A. Our experience with the public these days and times

the guilty conscience doesn't enter into the picture.

The Court: You think everybody has a little larceny in his heart then?

A. It looks that way.

Q. Mr. Bessinger, do you have any established policy that you pass down with reference to interstate, to your people working for you, with reference to interstate travelers? A. I am sorry?

Q. Do you have any policy with reference to interstate travelers that you pass down to your employees? A. Yes, sir, we do.

The Court: Excuse me just a moment. All right, you may proceed.

Q. What is that policy? A. Well the policy is that we do not serve interstate travelers, and we have—we go to great lengths to carry this out.

Q. By great lengths, what do you mean? A. First of all we put a large sign in the front of the building, which is very visible to all people that come into the lot. I would say 99% of every person that comes into the premises, unless he's hard of seeing—difficulty in him seeing, he would see this sign. And that is the number one. Of course 95% of interstate travelers who would happen to come into the

premises after seeing this sign, they don't question at all, they back up and drive right on. Sometimes not even stopped when they see the sign they continue driving, we noticed that. And of course, we have written instructions to the managers, which they in turn give these instructions

to all employees that every time an out of state tag is seen on the premises, or seen approaching the premises, they are asked the question do they reside in South Carolina, or are they passing through. And if they don't reside in South Carolina, they are told we are sorry but we do not serve interstate travelers. So this is policed as much as humanly possible.

Q. What installation is that, I hand you Defendants' Exhibit D? A. That is one of our best stores.

Q. Where is it located? A. Piggie Park, Charleston Highway, West Columbia.

Q. How many of those signs, we do not serve interstate travelers, are located on those premises? A. How many signs are located on this premises?

Q. Yes, that particular place. A. One large sign.

Q. Is there any painted on the window? A. It is not painted on the window, it is a cardboard type of thing taped to the window.

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Q. That one, is that the sign you referring to? A. Yes, sir. That is a sign in itself, that is taped to the window.

The Court: Do you have that one sign on that establishment, or at that establishment, do you have any other sign except the one in the window there?

A. No, sir. That's the only sign that I think specifically says those exact words that I can remember. I mean that is our major sign that says we do not serve interstate travelers. No, sir, I don't know of any other sign that says that.

Q. How about that one? A. That is the location on the Sumter Highway, has the same type of sign.

The Court: What exhibit is that?

Q. That is—I beg your pardon—that is Defendants' Exhibit B. How many entrances are there to that place of business? A. One.

Q. And is the same sign appears there? A. Yes, sir, at the door.

Q. Right adjacent to the door? A. Yes, sir.

Q. Is that the only door on the premises? A. That is

the only door.

Q. And that location, Defendants' Exhibit A is where? A. That is on 1430 Main Street in Columbia.

Q. How long have these signs been there, Mr. Bessinger? A. Well let's see, since July 2, 1964, immediately thereafter. In other words, I think it took us a couple of days there to get the signs painted. I don't exactly remember the day, but immediately thereafter July 2.

Q. Of course does the same thing apply to Defendants' Exhibit C? A. Yes, sir.

Q. On anywhere on your advertisements do you advertise for people to come in and dine with you in that sense? A. No, sir. We run a drive-in pickup. We call it barbecue drive-in specialty, which is primarily a pickup. Now some drive-ins do have restaurants inside, but we do not.

Q. Do you have any facilities inside of your kitchen where people could sit down and eat? A. Well we have two of the locations, Sumter and Two Knots Highway we have two or three small tables in there with a couple of chairs at each table that sometimes a customer will drive up and doesn't want to tip the curb girl. We just recently

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done this. They come inside to put in an order, and the table is there for them to sit and wait until the order is prepared and nine times out of ten and 99 out of 100 the order is to go and they get up and leave.

The Court: You say they come in because they don't want to tip?

A. I think that is the general consensus that I can determine.

Q. How long have you had your place of business at 1430 Main Street, Mr. Bessinger? A. We opened that in, I think, it was September 1, 1963, thereabouts. I would say around the 1st of September 1963, that is 1430 Main.

Q. 1430 Main. You had the drive-ins prior to that? A. Yes, sir.

Q. Mr. Bessinger, when you opened 1430 Main Street, tell us how this business is operated and how the facilities are fixed in there? A. Well it is very small.

Q. Is it wide? A. No, sir, it is very narrow.

Q. How wide is it? A. Let's see, I think it is about eighteen feet wide. Fourteen or eighteen feet wide.

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Q. And how long or deep? A. It is rather long. It is a hundred feet long, I think, something like that.

Q. How do you have tables in there? A. Yes, we do have tables in there.

Q. How are they arranged? A. The tables?

Q. Yes. A. Well little small tables with chairs.

Q. Are they down one side? A. Yes, sir. Down one side of the wall, and then of course a couple of tables in the back that are regular round tables.

Q. Do you have any tables, or have a balcony facility in there? A. Yes, sir, a little balcony upstairs.

Q. How many will that seat? A. The balcony will seat about eighteen or twenty.

Q. How many will you seat downstairs? A. About thirty-five or forty.

Q. Now, does this business downtown, where is it, is it in a business district or residential? A. It is in the second busiest downtown shopping street in Columbia. The 1500 block is, I think by the Chamber of Commerce reports, the busiest, and we are on the next busiest shopping

area downtown Columbia.

The Court: Is that north or south of the State House?

A. That is north of the State house.

The Court: How many blocks up from the State House?

A. It is three blocks.

The Court: Up there in the area of the Barringer Building?

A. Yes, sir. Right up from the Barringer Building, several doors up from the Barringer Building.

Q. When you opened this business, you say you opened it in '63, did you have any purpose in mind in opening it? A. Yes, sir, we had.

Q. Did you have any business benefit by opening it? A. Well of course all business ventures have what you might call an ulterior motive of profit. At that time with the situation being as they were—

Q. What you mean by that, sir? A. Well at that time there was a lot of demonstrations in Columbia, the preceding several months prior to us going into this business, and after—and these of course results of the demonstrations was almost everything on Main Street integrated.

Q. You mean everything on Main Street? A. I am talk-

ing about food establishments on Main Street.

Q. Do you have reference to restaurants or counters? A. Lunch counters primarily there because that's what it is in that area.

Q. And this affected the opening of this business? A. Yes, sir. I had a profit motive in that. I visualized there were things being as they were that there should be a nice place downtown for the workers, office workers and store workers and perhaps other shoppers who were white, who wanted to eat in non integrated establishment, and I ventured some $35,000 to $40,000 with that profit motive in mind.

Q. Based on the fact you would operate it segregated? A. Yes, sir, absolutely.

Q. At that time when you opened this business, did—was there any law to your knowledge in existence that would require you to integrate? A. No, sir. As a matter

of fact there was at that time quite a bit, this was in 1963, summer of '63, and there was quite a bit of discussion about a law in the President Kennedy Administration.

The Court: Let me see if I understand that question. You asked him back in '63 if there was any law that required him to integrate?

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Mr. Ray: Yes, sir.

The Court: I thought it was your position even the Civil Rights of '64 didn't require him to integrate.

Mr. Ray: If he doesn't come under the terms. If he's under it, he's under it; if he is not, we maintain he has the right to keep a segregated business, and I would assume there are—

The Court: I didn't understand. You said there wasn't any law in '63 that required him to integrate. I understand in your position that the Civil Rights Act of 1964 didn't require it.

Mr. Ray: What I was getting at, that as a business interest, profit motive, from that standpoint.

Q. Has this been a successful business, Mr. Bessinger? A. We were doing real good business there when we first opened, very good business.

Q. Now, have you in all your business operations, have you had the occasion to run checks on what type of business and things of that nature—is that a practice among restaurant owners, or anybody that sells food like that? A. Well, of course, one must know his business and one

must know who he is serving in order to be successful in

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business, and in other words he must know his customers. If he doesn't know the likes and dislikes and everything about his customers in general, this would, in my opinion, make him a poor businessman.

Q. Do you have any way of determining what kind of business you got? A. Absolutely. I mean over the years I have been very close to my business. I am one of the real conscientious, seven-day-a-week business people, and I enjoy my type of business. I make it a point to know what my customers like, and their dislikes, and I do this through personal interviews with my customers. I survey my customers from location to location continuously along those lines.

Q. And as a result of this has it affected your business operation, has it caused you to operate in a particular fashion? A. Why absolutely. What I mean, as I said, I know what my customers want, and I try to give them what they want, and that is atmosphere, might be quality of food, in general business operations. I know what they want; that's what I try to give them. Of course, every decision is based on the majority number of customers that you serve. In other words, that is the figure that any businessman—in other words when he would establish a price on an item, he would determine whether this would

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be received well by if this was received well by 90% of his customers, and he felt like he had to do this, he would do it. But if it was not received well by maybe 25% of his

customers, he would hesitate to raise the price. That is the type of thing I am talking about.

Q. What about with reference to integration and segregation? A. Of course that is a major thing on people's mind and has been for several years, and in my surveys I have found out I would lose quite a few customers had I operated on an integrated basis.

Q. By quite a few, have you determined an overall amount? A. Yes, I think if I would have integrated earlier or do integrate any time in the future, on the basis of what I can determine from my customers, my business may be cut 50%.

Q. You say may be cut 50%? A. Approximately 50%; it could go either way.

Q. How much either way do you feel? A. Well, I would say this is an estimate, I mean a guess on what I feel about these surveys.

Q. We don't want a guess, Mr. Bessinger. A. I'd say my business will be cut 50% if I am forced to integrate.

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Q. What about your employees, have you discussed the matter with them? A. Oh yes I have, and this would drastically affect my employee structure. You know employees are hard to get and especially the drive-in business, which is what I operate. The curb girl part is extremely hard to get good ones. We are very fortunate to have quite a few good ones, and I have talked to quite a bit of the girls on this type of thing, and I would say I'd lose 90% of that segment of my labor force if I am forced to integrate.

L. Maurice Bessinger—for Defendants—Direct

Q. With reference to other restaurants in Columbia, do you know of your own knowledge whether integration has affected that particular phase of their business? A. Well, yes I do. You make it a point to know how your competitors are doing in business, and I have noticed whereas—

Mr. Perry: Your Honor, I submit this is speculative. We object on the ground this is irrelevant, and that it is based upon hearsay testimony.

The Court: I think he's gone about far enough. I think it would be purely hearsay and I seriously doubt the relevancy.

Mr. Ray: If your Honor please, I am not going to belabor the thing. I asked him of his own knowledge if he knew this. And the relevancy, of course,

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goes to a basic property right that they maintain the man has in his business; to overrule the testimony would allow, of course, no evidence in on that whether you threw it out later on or not.

The Court: Well, are you still on the point of constitutionality of the Civil Rights Act?

Mr. Ray: Yes, sir, on that.

The Court: Well, it is my conception that *Katzenbach* v. *McClung,* which was cited by the United States Supreme Court, which is the particular section which this action was based, was constitutional under commerce law; and also the case of *Willis* v. *Picrick Restaurant,* which the three Judge court over at Atlanta had the same question before it, the constitutionality of 201 b(2) I believe it is, and that

court held that provision to be constitutional. So that is what I wanted to ask you if this line of testimony is in support of your contention that that provision under which this action has been brought of the Civil Rights Act of 1964 is unconstitutional. Is that the purpose of this line of testimony?

Mr. Ray: In that connection, your Honor, we have taken the position, or are taking the position, that there was no affirmative evidence introduced

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along those lines, and the court itself referred to a general look at it, and said it is speculative, conjectural. But when a man has gone in and investigated his own business and asked questions about it, and from that—

The Court: Let's move along. I will let you go into this, but I just don't want to dwell on it too long because I doubt very seriously it is relevant.

Mr. Ray: Well we feel too in that connection the right to contract with these employees is a property right of his that is involved in the matter also; and the question was of his own knowledge had it affected the employees at other restaurants, or drive-ins in Columbia rather.

The Court: I thought you asked him about the volume of business.

Mr. Ray: Of course I had gotten off that I thought.

The Court: All right, go ahead.

Q. Would integration, or has integration affected the employees at any of the other drive-ins in Columbia? A. Yes, sir.

Q. What do you mean by that? A. Well I have noticed that some other establishments in Columbia that did in-

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tegrate, that were using white curb hostesses, or girls, they lost these girls, and they had to convert to white and colored boys, and mostly I think from my observation colored boys as the curbhops. And as a matter of fact, I don't remember the exact names now, but I think some of those girls came to work for me that they lost.

Q. Have you made any effort to tailor where you buy your products, Mr. Bessinger? A. Yes, sir, we certainly have. We have gone to quite a bit of time and effort in this.

Q. Do you intend to further do that? A. Yes, sir, we will continue analyzing the whats and wherefores of where things are processed and grown, and this has the dual interest as far as I can see my part, not only helps South Carolina to buy things grown and processed in South Carolina, but according to the Bill it saves my property rights.

Q. Prior to 1964 did you, July 2, 1964, did you—was your business serving interstate travelers? A. Prior to July 2, 1964?

Q. Yes, when the Act was passed. A. Were we serving interstate travelers? Well we served maybe a very small number because my business is not designed to serve interstate travelers anyway. My business is set up to serve

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local people. You take people from New York don't eat barbecue—at least I don't think many of them do. My type of barbecue is known to be popular in central South Carolina. You go now in North Carolina you get an entirely

different type of barbecue. You go to Georgia, you get an entirely different type of barbecue. I have to rely on the likes of the people in central South Carolina, and they like my barbecue by the evidence of my sales. And that is, —I am catering to those people because if I catered to interstate travelers I'd go broke in the barbecue business because there's so many different variations of barbecue. The sauce varies from sometimes from county to county barbecue sauce will vary. In North Carolina they don't have a sauce, they have a vinegar dip; Georgia they have a red sauce; I have a yellow sauce.

The Court: How you spell that?

A. R-e-d. Some people from central South Carolina have this taste for the type sauce I have and I thank the good Lord for it.

Q. Mr. Bessinger, with reference to the total volume of your business, do you know how much of your business is carry out, or take away business from your drive-ins? A. Yes. Of course, as I said, we try to encourage this to the maximum degree. This would average 50%. Carry out would average 50%. I say average, because in the real

cold temperature it would jump up to eighty to ninety per cent; in the real hot temperature it would also jump up to eighty to ninety per cent. So it will have an overall percentage of my business that I know for a fact is carried back to the office or carried back home or carried on a picnic, what have you.

Q. Do you in fact have facilities for bulk carrying out? A. Yes we sell a lot of barbecue by the pound. We sell a lot of quarts of hash by the quart, and slaw by the quarts, and rice by the quarts. We built up quite a big business on that.

Q. Carry off? A. Oh absolutely, and July 4th we sell several tons of barbecue.

Q. How about at the sandwich shop? A. The sandwich shop we offer three minute service there, and this encourages, I notice this being up there quite a bit, I usually run the cash register there at the lunch when I am not detained elsewhere. I notice these girls in these—we have a lot of office workers come in there, 80% of my customers are ladies, and they come in and they will get something quick in a bag to go and they have a thirty minute lunch hour or forty-five minute lunch hour, some may have an hour, they come in there and get something real quick

wrapped to go and then they will spend the other forty-five minutes shopping on Main Street. You see they eat this quick when they get back to the office.

Q. What time of the day is the bulk of your business and how much of it have you figured, if you have, at the sandwich shop on Main Street? A. There we do 90% of our business from the hours of 11:00 to 2:30, what we call the lunch hour. We do very little before and very little after.

Q. What hours is the sandwich shop open? A. We open at 9:00 and close at 6:00 as a rule. Maybe on Friday and Saturday night, actually we close with the stores. If the stores are staying open late, we stay open late.

Q. All right, sir. A. We close there on Sunday too.

Q. Do all of your drive-ins have a telatronic tray device? A. Teletray service, electronic ordering service, yes, the drive-ins do have this.

Q. And why was that put in? A. Well that was put in to speed service, and to help combat the labor problem. What I mean is, I guess, suppose good curb hostesses are one of the hardest type of labor to find, and you operate with half

as many at least half as many curb hostesses with this system.

Q. Then the design of your business, and the character of the operation is vital to its success? A. Oh yes.

The Court: I would assume that would apply to any business.

Mr. Ray: Well your honor, that's what we maintain, it is a valuable property right. I don't see how it can be escaped—not you sir, but decisions that indicated that way.

Q. Mr. Bessinger, what denomination are you? A. Baptist.

Q. How long have you been a Baptist? A. Well all my life. I was Baptized I suppose—

The Court: Does that have any relevancy here?

Mr. Ray: If your Honor please, we are going to the defense on religious belief unless you're going to stop us.

L. Maurice Bessinger—for Defendants—Direct

The Court: You have any authority that would be a defense?

Mr. Ray: Well, your Honor, I think the Act itself, including all of the Acts they passed recently, they have granted people the right to enter businesses on the basis of religion, without any qualification as to religion; also put it in as a requirement on hiring

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and firing people. I think they have done that in voting; and I think that the entire trend, they have injected it in fact into this Act in that they have said on the basis of religion you couldn't refuse to serve them food. Then they have enacted a law basing his service and making it dependent upon the fact that a person has a religion that comes into his place of business, the criteria in there.

The Court: Well you may have some knowledge of some cases that I don't have, and I will just let it in for whatever it may be worth on your statement that it may possibly be connected up as a defense to this case, and of course I got to see more than I have seen up to now to feel that it would be a defense.

Mr. Ray: All right, sir. Well that is what I was—

The Court: All right, go ahead.

Q. Mr. Bessinger, are you a Christian? A. Yes.

Q. Or do you profess Christianity? A. Yes.

Q. And what is your Christian faith based upon? A. My Christian faith is based upon the old and new Testaments of the Bible.

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Q. And do you believe in this Bible infallibly? A. I believe it to be the infallible word of God.

Q. And is it—in your treatment with the everyday individual everyday, do you follow this? A. Well I certainly think I try to. I mean I do it as much as I possibly can. What I mean by that, I certainly hope I am living that life, that is what your question is.

Q. It is your belief to that effect? A. Absolutely.

Q. Do you have any beliefs concerning segregation of the races, is that intwined or intermingled with or part of your beliefs as a Christian? A. Yes, sir, that is very much part of my belief as a Christian, mixing of the races certainly is.

Q. By races you refer to what, sir? A. By races, I refer to the race as the black race, the white race, and the yellow race.

Q. What is the Biblical basis, if any, for such a belief? A. Well in the Old Testament God commanded the Hebrews not to mix with other peoples and races.

Q. Do you know of any such practice going on in the United States under a religion today? A. Why yes, I think that I know for a fact there is.

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Q. What— A. Sure.

Q. What religion? A. What religion? Well Jewrism—

The Court: You are not talking about intermarriage of the races; we are talking about serving races.

L. Maurice Bessinger—for Defendants—Direct

Mr. Ray: I got something right here about social association of races.

The Court: I just don't want to belabor the point too long. I don't mind you getting it into the record, but let's not go into all the tenets of the Old Testament and New Testament and that.

Mr. Ray: I think counsel anticipates a somewhat lengthy cross examination. If your Honor please, let me ask him another question.

Q. Do you know of any other race of people in this country that maintain segregation as a matter of religion? A. Yes, I do.

Q. What? A. Well you have the Black Moslem as part of their religion they don't believe in mixing.

Q. How about eating food with other people? A. Eating food with other people? Yes, they believe in separation as far as my conception of it, entire separation.

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Q. All right, sir.

Mr. Ray: You object to the introduction of this?

Mr. Perry: I fail to see the relevancy of it. Of course we will have an objection.

Mr. Ray: All right.

The Court: What is it?

Mr. Ray: If your Honor please, it is a newspaper clipping.

The Court: Well, I don't want to see it if it is just a newspaper clipping.

Mr. Ray: It is a story on one of our religions.

Colloquy

The Court: You can get things out of the newspaper to back up any position you want to take. I don't think—that would be purely hearsay as far as this action is concerned, and I don't want to get into that.

Mr. Ray: Would the Court take judicial knowledge of the Jewish faith, as encompassing, the Orthodox Jewish faith as encompassing the separation of races, including integrated and social activity that would lead to it.

The Court: I don't think I would take judicial knowledge of that kind of thing because it may be well known, but I don't happen to know about it

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myself.

Mr. Ray: Would it not appear in books of record in common knowledge, sir?

The Court: I don't know whether it would or not. I mean you come in here with some newspaper clipping, you don't come up with any official publication or any expert witness. Now you got a man on the stand here that can testify, he's an expert insofar as running the restaurant business. You may qualify him as an expert in religious philosophy and he may be able to express some opinion, but I won't open the door wide open and let you bring in all newspaper clippings.

Mr. Ray: That was just one, your Honor. I don't have any further questions.

The Court: All right.

Mr. Perry: Would you indulge us a moment please, your Honor?

The Court: Certainly. (Pause) You have any questions of this witness?

Mr. Perry: We have no questions of this witness, your Honor,

The Court: All right, you may step down, Mr. Bessinger.

Mr. Ray: If your Honor please, that concludes

our case. We would like to make some motions.

The Court: Like to do what?

Mr. Ray: Like to make some motions.

The Court: What is the nature of your motion?

Mr. Ray: Motions are for directed verdict on the thing, and if—

The Court: Just a minute, I want to find out if there's any reply testimony on the part of the plaintiff. Anything in reply?

Mr. Perry: Nothing in reply, your Honor.

The Court: All right, you may make your motion.

Mr. Ray: All right, sir. I don't assume your Honor wants to hear me on them at length?

The Court: What's that, you assume what?

Mr. Ray: I was asking should I assume you want to hear me at length, the hour is 12:30, you mentioned you wanted to leave to see Judge Fields.

The Court: I am not trying to cut anybody short. What I am saying, this is a non jury case. I am going to take it under advisement and study it, both counsel will have plenty of opportunity to file

briefs and argument, what have you. If you wish to make any motions I will be glad for you to make them. Be glad for you to make any statement you

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care to make, but I am not going to decide this case from the bench. I am going to take it and study it because it is the first time I have had a case involving the Civil Rights Act of 1964.

Mr. Ray: All right, sir.

The Court: And I am not in a position at this time to make a decision from the bench and I want the assistance of counsel in trying to arrive at a proper decision in this case.

Mr. Ray: All right, sir. For the record then briefly I would like to move for verdict for the Defendants based first on failure to prove that defendants come under the Act by the plaintiff. Secondly, that the defendants are not principally engaged in selling food for consumption on the premises as required by the Act. Thirdly, that a substantial portion of the foods that they have served and the products, food being the product, they sell have not moved in commerce within the meaning of the Act. The evidence also is that the defendants do not serve the general public as such, but have excluded other than colored people and in fact have served colored people, and that is not to say they have the full facilities and I am not making that argument or any testimony.

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Also for a directed verdict in that the defendant is not within Federal control or regulation under the

commerce clause, Section 8, clause 3 for various reasons that will come out in the other defenses. They do not affect commerce; they don't serve a substantial portion of food or other products that move in commerce; they don't serve, or offer to serve, interstate travelers; and they otherwise are not within the purview of the meaning of the Civil Rights Acts of 1964, in that the Civil Rights Act of 1964 violates their constitutional rights under the Fifth Amendment as to full use and enjoyment of their property; and unlawful taking thereof without due process of law, and denial of due process of law as defined within the defenses applicable to the Fifth Amendment of the Constitution, with particular reference to the fact that the words "principal", and "substantial" are incapable as so written in the Act of legal definition; that it is conceivable that a business would not be substantially under the Act, yet be the same type of business that the defendant maintains, and as to that class of businesses there is an unequal treatment for no good distinguishable difference. The word substantial itself could mean, even under the most recent and only court decision on the matter,

one to forty-six per cent. On any given day in the United States any man in the restaurant business could, at the discretion of the court or determination at that particular instance, could determine him under it or not under it; and for that reason it is vague, indefinite, arbitrary, and denies the defen-

dant, and all similarly situated, due process of law within the constitutional interpretations that have been handed down since the beginning of this country. Generally that it imposes a type of servitude upon the defendants, their servants, agents, or employees in violation of their rights under the Amendment and tends to encompass all of them. And on that point, your Honor, right there I would like to mention now it is attempted here to obtain an injunction against the defendants and its employees. Since it would not mean his employees by name, I am assuming that they would have the right to refuse service to anyone and leave and quit. I am assuming that rather than that they would be subject to some court penalty for quitting and leaving this man's place of business.

The Court: Well, of course, that argument presupposes that there is going to be an injunction, and I think any injunction that this Court would issue would be clear enough that it would be under-

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standable as to the terms and conditions of it.

Mr. Ray: And in that connection, of course, it applies to the defendants that the type of involuntary servitude within the provision of the Thirteenth Amendment would be upon him, and that the Act itself violates the freedom of expression of religion within the meaning of the First Amendment of the Constitution of the United States. And finally, I would like to drop back to my fourth defense and state further that the taking for public use is with-

out compensation and is a taking prohibited by the Constitution and the due process also encompasses a denial of the user, that no case has separated private property from public property and that historically has been a distinction in our jurisprudence of judicial significance. Without adherence, or continued adherence, this man and others similarly situated would be put in a situation of jeopardy under the Constitution and under the due process Amendment. Thank you, your Honor.

The Court: I let the record show you made these motions for directed verdict in favor of the defendant upon the various grounds as stated. As I said before, I am not going to rule on the merits

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of this case at this time until I have had an opportunity to study the record and also the applicable law involved. In that connection I am going to direct that counsel for each party file with the Clerk of this Court on or before May 1st, 1966 a proposed Order setting forth findings of fact and conclusions of law in reference to this case, which may be supplemented or supported by any briefs and argument, written briefs and arguments which either party cares to present to the court.

Mr. Ray: Yes, sir. That is on or before May first.

Mr. Perry: I understand, your Honor. May I make inquiry from Mrs. Cole concerning when she can possibly have the transcript.

(The reporter informed the court it would probably be the latter part of April.)

Adjournment

The Court: May 15 in view of the reporter's statement that it would be towards the latter part of April. I will expect these proposed Orders and any argument and brief to be filed with this Clerk on or before May 15, 1966. All right, with that, this Court is now adjourned.

Opinion and Order of the District Court

(Filed: July 27, 1966)

This suit was commenced December 18, 1964 by plaintiffs, who are Negro citizens and residents of South Carolina and of the United States, on behalf of themselves and others similarly situated, pursuant to Rule 23(a)(3) of the Federal Rules of Civil Procedure. Jurisdiction of this court is expressly conferred by Title II, Section 207 of the Civil Rights Act of 1964, 42 U. S. C. Section 2000a-6.[1]

The gravamen of plaintiffs' complaint is that corporate defendant operates several restaurants in Columbia and elsewhere in South Carolina which are places of public accommodation within the purview of the Civil Rights Act of 1964; and that defendant violated said Act by denying service to plaintiffs at certain of its restaurants on July 3rd and August 12th, 1964 solely upon the ground that they were Negroes. The complaint further specifically al-

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[1] "*§ 2000a-6. Jurisdiction; exhaustion of other remedies; exclusiveness of remedies; assertion of rights based on other Federal or State laws and pursuant of remedies for enforcement of such rights*

"(a) The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this subchapter and shall exercise the same without regard to whether the aggrieved party shall have exhausted any administrative or other remedies that may be provided by law.

"(b) The remedies provided in this subchapter shall be the exclusive means of enforcing the rights based on this subchapter, but nothing in this subchapter shall preclude any individual or any State or local agency from asserting any right based on any other Federal or State law not inconsistent with this subchapter, including any statute or ordinance requiring nondiscrimination in public establishments or accommodations, or from pursuing any remedy, civil or criminal, which may be available for the vindication or enforcement of such right. Pub. L. 88-352, Title II, § 207, July 2, 1964, 78 Stat. 245."

leges that in their restaurants defendants serve and offer to serve interstate travelers; that a substantial portion of the goods which they serve move in interstate commerce; and that defendants' operations affect commerce between the states. Plaintiffs ask that defendants be temporarily and permanently enjoined from discriminating against plaintiffs and the class of persons they represent upon the ground of race, color, religion and national origin.

Defendants admit jurisdiction of the court under Section 2000a-6, *supra,* generally deny the material allegations of plaintiffs' complaint, and specifically deny the allegations of the complaint which allege that their establishments are places of public accommodation as defined in the Civil Rights Act of 1964. Although defendants concede that they cater to white trade only and refuse to serve members of the Negro race at their restaurants for on-the-premises consumption of food, they stoutly maintain that they do not come within the coverage of Section 2000a(b)(2) and (c)(2) of the Act, *infra* note 2, because (1) they do not serve the public as required by the Act; (2) they are not principally engaged in selling food for consumption on the premises; (3) they do not serve or offer to serve interstate travelers; and (4) they do not serve food, a substantial portion of which has moved in commerce.

Defendants further contend that all foodstuffs served by them which are processed in this state, including cattle and hogs slaughtered in South Carolina, although shipped in commerce from another State to this State, cannot be considered as moving in interstate commerce under the Act; that the Act denies defendants "due process of law and/or equal protection of the law" as guaranteed by the Four-

teenth Amendment; that the phrase "substantial portion of the food which it serves . . . has moved in commerce" is so vague and indefinite as to be impossible to determine whether a business operation comes within the Act; and further, that the Act violates defendants' "property right and right of liberty protected by the Fifth Amendment."

Defendant Bessinger further contends that the Act violates his freedom of religion under the First Amendment "since his religous beliefs compel him to oppose any integration of the races whatever."

The constitutionality of the public accommodations section, Title II of the Civil Rights Act of 1964, 42 U. S. C. Section 2000a, has been fully considered and determined by the United States Supreme Court in *Atlanta Motel* v. *United States, et al.*, 379 U. S. 241 (1964); *Katzenbach* v. *McClung*, 379 U. S. 294 (1964); see also *Willis* v. *Pickrick Restaurant*, 231 F. Supp. 396 (1964), appeal dismissed, 382 U. S. 18 (1965).

The constitutional questions posed by defendants herein were before the Supreme Court in *McClung* and *Atlanta Motel, supra,* and were decided adversely to defendant's contentions. Consequently, defendant's defenses founded upon the due process and equal protection clauses of the Fourteenth Amendment, the Fifth Amendment, and the Commerce Clause of the Constitution are found by the court to be without merit in view of the *McClung* and *Atlanta Motel* cases, *supra.* It is noted that in *McClung, Atlanta Motel* and *Pickrick Restaurant* the motel and restaurants involved were admittedly places of public accommodation under the Act, there being no factual issue as to whether they came within the purview of same. Neither

was any question raised that the restaurants involved therein were not principally engaged in selling food for consumption on the premises. The sole consideration before the lower courts and the Supreme Court in those cases was the question of the constitutionality of the public accommodations provisions of the Act (Section 2000a).

Neither is the court impressed by defendant Bessinger's contention that the judicial enforcement of the public accommodations provisions of the Civil Rights Act of 1964 upon which this suit is predicated violates the free exercise of his religious beliefs in contravention of the First Amendment to the Constitution. It is unquestioned that the First Amendment prohibits compulsion by law of any creed or the practice of any form of religion, but it also safeguards the free exercise of one's chosen religion. *Engel* v. *Vitale*, 370 U. S. 421 (1962). The free exercise of one's beliefs, however, as distinguished from the absolute right to a belief, is subject to regulation when religious acts require accommodation to society. *United States* v. *Ballard*, 322 U. S. 78 (1944) (Mails to defraud); *Reynolds* v. *United States*, 98 U. S. 145 (1878) (polygamy conviction); *Vince* v. *Commonwealth of Massachusetts*, 321 U. S. 158 (1943) (minor in company of ward distributing religious literature in violation of statute). Undoubtedly defendant Bessinger has a constitutional right to espouse the religious beliefs of his own choosing, however, he does not have the absolute right to exercise and practice such beliefs in utter disregard of the clear constitutional rights of other citizens. This court refuses to lend credence or support to his position that he has a constitutional right to refuse to serve members of the Negro race in his business establishments upon the

ground that to do so would violate his sacred religious beliefs.

The sole question for determination under the circumstances of instant case is whether any or all of defendants' eating establishments are places of public accommodation within the meaning and purview of Section 201 of Title II of the Civil Rights Act of 1964 (Section 2000a).[2] In arriving at this determination the court is primarily concerned

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[2] "§ *2000a. Prohibition against discrimination or segregation in places of public accommodation—Equal access*

"(a) All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.

"Establishments affecting interstate commerce or supported in their activities by State action as places of public accommodation; lodgings; facilities principally engaged in selling food for consumption on the premises; gasoline stations; places of exhibition or entertainment; other covered establishments

"(b) Each of the following establishments which serves the public is a place of public accommodation within the meaning of this subchapter if its operations affect commerce, or if discrimination or segregation by it is supported by State action:

"(1) . . .

"(2) any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility, principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment; or any gasoline station;

"(3) . . . ; and

"(4) . . .

"(c) The operations of an establishment affect commerce within the meaning of this subchapter if (1) . . . (2) in the case of an establishment described in paragraph (2) of subsection (b) of this section, it serves or offers to serve interstate travelers or a substantial portion of the food which it serves, or gasoline or other products which it sells, has moved in commerce; . . ."

with the following factual and legal questions, which will be considered in inverse order hereinafter: (1) [redacted] corporate defendant's establishments, or any of them, "principally engaged in selling food for consumption on the premises;" (2) Does said defendant at its establishments serve or offer "to serve interstate travelers;" and (3) has "a substantial portion of the food which it serves, . . . or other products which it sells . . . moved in commerce"?

Should the court's answer to question #1 be in the affirmative, and either questions #2 or #3 in the alternative in the affirmative, then such of defendants' establishments are places of public accommodation within the purview of the Act, and plaintiffs are entitled to the requested relief as to these establishments.

The cause was heard by the court on April 4th and 5th, 1966. Subsequently excellent briefs and arguments have been filed by counsel for the parties. After a careful consideration of the evidence and the law and pursuant to Rule 52(a) of Federal Rules of Civil Procedure the court makes its findings of fact and conclusions of law.

Findings of Fact

1. Defendant Piggie Park Enterprises, Inc., hereinafter designated as Piggie Park, is a South Carolina corporation with its principal office in Columbia, South Carolina. Defendant L. Maurice Bessinger, hereinafter designated as Bessinger, is the principal stockholder and general manager of the corporate defendant.

2. Piggie Park owns, operates, or franchises six eating establishments specializing in Southern style barbecue

which are located as follows:[3] 1) Piggie Park No. 1, 1601 Charleston Highway, also being designated as U. S. Highways Nos. 21, 176 and 321 at the intersection of S. C. Highway No. 215, in West Columbia, South Carolina; 2) Piggie Park No. 2 on the Sumter Highway, also being designated as U. S. Highways Nos. 76 and 378 in Columbia, South Carolina; 3) Piggie Park No. 3 on the Camden Highway, also being designated as U. S. Highway No. 1, in Columbia, S. C.; 4) Piggie Park No. 4 on Broad Street Extension, which is also designated as U. S. Highways Nos. 76, 378 and 521 in Sumter, South Carolina; 5) Piggie Park No. 6 on Highway No. 291 By-Pass North, which connects U. S. Highways Nos. 25, 29, and Interstate Highways Nos. 85 and 385 in Greenville, South Carolina; and 6) Piggie Park No. 7, also known as "Little Joe's Sandwich Shop," at 1430 Main Street in Columbia, South Carolina. All of Piggie Park's eating places are of the drive-in type with the exception of Piggie Park No. 7 also known as "Little Joe's Sandwich Shop" in downtown Columbia. In order to be served at one of the drive-ins a customer drives upon the premises in his automobile and places his order through an intercom located on the teletray immediately adjacent to and left of his parked position. After pushing a button located on the teletray his order is taken by an employee inside the building who is generally out of sight of the customer. When the order is prepared a curb girl then delivers the food or beverage to the customer's car and collects for same. This is generally the only contact which

[3] The official South Carolina State Highway Department Primary System Map for 1965-66 has been used in determining the United States and State Highway designations.

any of defendant's employees has with any customer unless additional service is desired. The orders are served in disposable paper plates and cups, and may be consumed by the customer in his automobile on the premises or after he drives away, solely at his option. There are no tables and chairs, or counters, bars or stools at any of the drive-ins sufficient to accommodate any appreciable number of patrons. The service is geared to service in the customers' cars. Piggie Park claims the distinction of operating the first drive-in specializing in barbecue although it sells other types of short orders. The barbecue meat and hash comprising a substantial majority of its sales are sold in bulk by the pound or the quart, as well as in individual orders. Customers are encouraged to consume the food off the premises by its service in disposable containers, with no chinaware or silver eating utensils being used. At the five drive-ins the carry-out business for off-the-premises consumption averages fifty percent during the year, depending upon the season and the weather.[4]

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[4] The uncontradicted testimony of defendant Bessinger at pp. 222-223 of Tr. was as follows:

"Q. Mr. Bessinger, with reference to the total volume of your business, do you know how much of your business is carry out, or take away business from your drive-ins? A. Yes. Of course, as I said, we try to encourage this to the maximum degree. This would average 50%. Carry out would average 50%. I say average, because in the real cold temperature it would jump up to eighty to ninety percent; in the real hot temperature it would also jump up to eighty to ninety percent. So it will have an overall percentage of my business that I know for a fact is carried back to the office or carried back home or carried on a picnic, what have you.

"Q. Do you in fact have facilities for bulk carrying out? A. Yes we sell a lot of barbecue by the pound. We sell a lot

3. Piggie Park No. 7, or "Little Joe's Sandwich Shop", in downtown Columbia is the one exception to the drive-in type operation. Defendant operates this establishment as a cafeteria type sandwich shop offering three-minute service, also specializing in barbecue, with table and chair seating capacity for sixty customers and where the food is primarily consumed on the premises. It is located in the prime shopping area of Columbia's Main Street; ninety percent of its business is between 11:00 a.m. and 2:30 p.m., with the majority of its customers being office workers, clerks and downtown shoppers. Its business hours correspond generally with those of the surrounding retail stores.

4. Two of the Negro plaintiffs were denied service by Piggie Park No. 2 on the Sumter Highway in Columbia on August 12, 1964 when they drove upon the premises in their automobile. At first a waitress who came out seeing that they were colored went back into the building without taking their order or saying anything to them. Shortly a man with an order pad came to their car, he also refused to take their order, and gave no reason or excuse for this denial of service, although other white customers were being served there at that time. The fact that Piggie Park at all six of its eating places denies full and equal service

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of quarts of hash by the quart, and slaw by the quarts, and rice by the quarts. We built up quite a big business on that.

"Q. Carry off? A. Oh absolutely, and July 4th we sell several tons of barbecue."

It is noted that plaintiff's counsel did not cross-examine Bessinger to any extent in reference to the above testimony and no evidence was offered to counter or rebut the same.

to Negroes because of their race is uncontested and completely established by the evidence. The limited Negro customers who are served must place and pickup their orders at the kitchen windows and are not permitted to consume their purchases on the premises. Thus, Negroes because of race are being denied full service and are victims of discrimination at all of Piggie Park's eating establishments.

5. No effort is made by defendant to determine whether a Negro customer who purchases food on a take-out basis is an interstate traveler.

6. Piggie Park displays on each of its establishments one modest sign located generally in the front window advising that it does not serve interstate travelers. In its newspaper advertisements is included a notice in small print at the bottom of the ad advising that "we do not serve interstate travelers".[5] No mention of this practice is included in any of its radio advertisements for business. Although some testimony and business records indicate that defendant has refused to serve a very limited number of interstate travelers in the past, the inescapable conclusion demanded by all of the circumstances before the court is that many interstate travelers do obtain service at all of its locations. Except for the small sign in the window no steps are taken by defendant at "Little Joe's Sandwich Shop" to determine whether or not a customer is an interstate traveler, and at its drive-ins no attempt to determine a customer's travel status is claimed to be made until after

[5] See defendant's Exhibit "G".

his order is prepared and actually delivered to his automobile. If the curb girl who serves the order notices that a customer's car bears an out-of-state license, she is instructed to inquire whether such customer is an interstate traveler or is residing in South Carolina. There is testimony to the effect that if the customer admits that he is an interstate tourist service is denied to him although the food has been especially prepared to his order. No inquiry whatever is made of any customers who are riding in an automobile with South Carolina License plates. Inasmuch as all five of defendant's drive-ins are located at most strategic positions upon main and much traveled interstate highways and especially in view of the limited action taken by defendant to determine the travel status of its customers the court can only conclude that defendant does serve interstate travelers at all of its locations.[6]

7. Several employees of wholesale food companies which regularly sell foodstuffs and other merchandise to Piggie Park testified that the bulk of the food and related products sold by their firms to defendant was and is obtained by them from producers and suppliers beyond the State of South Carolina as follows:

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[6] The only direct evidence adduced by plaintiffs tending to establish service to interstate travelers was the testimony of their witness, Sharon A. Miles, a white woman who entered "Little Joe's Sandwich Shop" on April 2, 1966 and obtained service without any question. Upon cross-examination she admitted that she and her husband who is the Columbia Director for the South Carolina Board of Voter Education Project had resided in this state for one and one-half years. Apparently plaintiffs made no attempt to conduct any surveys at defendant's drive-in establishments to show that customers in out-of-state automobiles were actually being served at any of defendant's locations.

(a) Greenwood Packing Company, a large supplier of meat products, purchases two-thirds of its merchandise from suppliers outside of South Carolina. They sell primarily pork shoulders, spareribs and Boston Butt (a cut off the shoulder). All hogs are live when purchased by it. They are thereafter slaughtered, cut-up, processed and packed within the State of South Carolina. Its total sales to defendant during the fiscal year 1964-65 was $39,663.91 and $15,148.24 from June 1 through December 12, 1965. Its sales to defendant are made without keeping records to indicate which of its meat is produced or slaughtered in South Carolina as contrasted to that which is purchased by it from out-of-state already processed and ready for sale to defendant.

(b) Dreher Packing Company of Columbia, South Carolina, a wholesale distributor of luncheon meats, pork sausage, beef and ground beef patties regularly sells meat products to defendant. Approximately eighty percent of the meat products sold by it to Piggie Park is acquired from suppliers from outside of South Carolina, and no records are maintained to distinguish the in-state from the out-of-state items. However, all of its meat products is processed in some manner by it within the state before sale and delivery to defendant. It considers defendant as one of its good customers.

(c) Holly Farms Poultry Industry, which secures eighty-five percent to ninety percent of its chickens from a North Carolina supplier, sells a small quantity of meat each month to defendant.

(d) Piggie Park no longer sells beer at any of its locations, its licenses having expired in June 1965. Prior to that time substantial quantities of beer were purchased from Schafer Distributing Company of Columbia, none of which was brewed in South Carolina. It also purchased beer from Acme Distributing Company, distributors of Pabst Blue Ribbon beer which was shipped into the state from Peoria, Illinois.

(e) Defendant purchases pepsi-cola syrup by the gallon from Pepsi-Cola Bottling Company of Columbia. The ingredients which go into this syrup are shipped into South Carolina from New York, Kentucky and Georgia. During 1965 defendant purchased 1,374 gallons of the syrup at $2.75 per gallon, including tax.

(f) Defendant regularly buys fresh, frozen and canned foods from Pearce-Young-Angel of Columbia, a large wholesaler. With the exception of its eggs all items regularly sold to defendant, including limes, onions, beef patties, cabbage, lettuce, tomatoes, french fried potatoes, bell peppers, shrimp and cheese are produced out of South Carolina. Defendant's purchases from this firm during the fiscal year 1964-65 amounted to $41,255.45, most of which had moved into the state in commerce.

(g) Thomas and Howard Company of Columbia, a large wholesale distributor of food and related products, regularly sells merchandise to defendant such as coco-cola syrup, sugar and salt. Altogether it handles approximately 7,000 items with about sixty percent or more being food items, mostly produced or

manufactured in states other than South Canolina. Thus a large quantity and variety of the products purchased by defendant from this company have moved in commerce. Although only about sixty percent of the items purchased from it are foodstuffs the remaining forty percent of the items as herein enumerated are necessary and related to either the preparation of defendant's food for sale or its service of same.

(h) Epes-Fitzgerald Company sells to defendant paper products consisting of cups, plates, napkins, waxed paper, paper bags and boxes. Of these items all are manufactured outside of South Carolina except the paper cups and the paper boxes.

(i) Trusdale Wholesale Meat Company of Columbia sold a substantial quantity of meat products to defendant up until August 1965. Since that time they have made no sales to the defendant. This supplier received less than five percent of its products from outside of South Carolina.

(j) Roddey Packing Company of Columbia also supplies meat products to defendant. Approximately twenty percent of its hogs are purchased live out-of-state and then slaughtered and processed in South Carolina before sale to its customers.

(k) Southeastern Poultry Company of Columbia is another supplier of chickens to defendant. All of its chickens are grown and processed in South Carolina. During 1964 its sales to defendant totalled $6,895.82 and in 1965 totalled $13,757.48.

8. Mrs. Merle Brigman, defendant's bookkeeper and chief buyer of its merchandise, testified that she had made a compilation from defendant's records which she keeps to determine what percentage of food served by defendant was either produced, grown or processed in South Carolina. In arriving at her percentages she did not include as out-of-state foods such items as live hogs and cows purchased out-of-state by their suppliers when slaughtering or any processing were done in the state prior to delivery to defendant. Neither did she include pepsi-cola syrup concentrate purchased from the Pepsi-Cola Bottling Company as an out-of-state product since it was mixed and processed within the state. Not included in her percentages were any of the ancillary or related items purchased by defendant's suppliers from out-of-state such as salt, sugar, paper products, spices, etc. She concluded that twenty-five percent of the "food" purchased by defendant during fiscal years 1963-64 and 1964-65 was "processed and/or manufactured" outside of South Carolina, and seventy-five percent was produced and/or manufactured into "food" within South Carolina. She further testified that eighteen percent of defendant's "food" purchased during the period of June 1, 1965 through December 12, 1965 was "processed and/or manufactured" into "food" out-of-state.[7] Defendant's bookkeeper also testified that defendant's expenditures for food and related items for fiscal year 1963-64 totaled $240,565.58 and for fiscal year 1964-65 totaled $222,845.25. Its expenditures for May 31, 1965 through December 12, 1965 were $122,724.13.

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[7] See defendant's Exhibit "E", witness's compilation of in-state and out-of-state foods.

Considering defendant's admission that from eighteen percent to twenty-five percent of its "food" in a finished and ready-for-use form for the years 1963 through 1965 moved in commerce into the state from another state; also the large quantities of live cattle, hogs and chickens purchased by defendant's suppliers from outside of the State and slaughtered and processed within the State before delivery to defendant, which were not included by defendant in its out-of-state percentages, along with other foodstuffs purchased by it which were shipped into the State and processed herein, together with such related items as sugar, salt, pepper, spices and sauces which admittedly moved in commerce, it is obvious that considerably more than twenty-five percent of the total food products served by defendant came from outside of the State. The court is persuaded and therefore finds that at least forty percent of the food served by defendant during the years in question "moved in commerce".

Conclusions of Law

By Section 2000a(c) Congress has determined that an establishment described in paragraph (2) of Subsection (b) of Section 2000a affects commerce within the meaning of the public accommodations subchapter of the Act if "it serves or offers to serve interstate travelers or a substantial portion of the food which it serves . . . , has moved in commerce". As was stated by the Three-Judge Court in *Willis* v. *Pickrick Restaurant*, 231 F. Supp. 396 (N. D. Ga. 1964), at page 399:

> "[T]he application of the Civil Rights Act to these defendants depends upon the resolution of issues of

fact, for a restaurant is not brought within the definition of interstate commerce unless it meets one of the tests enumerated in subparagraph (c) of Section 201. *These tests are in the alternative.* Either it must serve or offer to serve interstate travelers *or* a substantial portion of the food which it serves or other products which it sells must have moved in interstate commerce." (Emphasis added.)

Moreover, the Supreme Court in *McClung, supra,* in upholding the constitutionality of the public accommodations section of the Act indicated that Congress has made sufficient findings of discrimination to be conclusive and acted within its constitutional right granted by the Commerce Clause of the United States Constitution. Thus it is not necessary in this or any other individual case to determine that defendant's acts in actuality affect commerce in and of itself; but it is necessary to determine whether defendant in the operation of its eating establishments serves a substantial portion of food which has moved in interstate commerce, *or* whether it serves or offers to serve interstate travelers. If it is determined that defendant's establishments meet either of these tests in the alternative, then under the Act they affect commerce.

Has a substantial portion of the food which defendant serves in its six eating establishments moved in interstate commerce? In line with the factual determinations hereinabove arrived at the answer is yes. Although the Act does not specifically define "substantial" the court construes it in the light of its usual and customary meaning: That is, something of real worth and importance; of considerable

value; valuable; something worthwhile as distinguished from something without value or merely nominal.[3]

Under defendant's own admission that twenty-five percent of the foods it served in the years 1963-64 and 1964-65 and eighteen percent for the first six months of fiscal year 1965-66 moved in commerce, the court has no hesitancy in concluding as a matter of fact and law that a "substantial" portion of the food which it serves has moved in interstate commerce.

Neither can the court agree with defendant's contention that all foodstuffs, including hogs, beef and chickens, together with other related items, which are slaughtered or processed within the State after having been shipped in from another state, should be considered as in-state goods which have not moved in commerce on the basis that they came to rest in this state and thereby became intrastate in character. Such contention was overruled by *McClung, supra*, at page 302 where the Court stated:

> "Nor are the cases holding that interstate commerce ends when goods come to rest in the State of destination apposite here. That line of cases has been applied with reference to state taxation or regulation but not in the field of federal regulation."

From the foregoing this court has a mandate from the Supreme Court to conclude that all products sold to defendant as food by its producers which have moved in interstate commerce into this state in some form, even though they may have been slaughtered or otherwise processed

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[3] Definition of "substantial" contained in Black's Law Dictionary, Fourth Edition, 1951.

after arrival here, are to be considered as food which has moved in commerce, as that phrase is used in Section 2000a (c)(2) of the Act. Therefore, by including all foodstuffs served by the defendant during the periods under consideration which have moved in interstate commerce the court has concluded that at least forty percent of the same has moved in commerce and unquestionably constitutes a "substantial" portion of the total food which it serves in all of its six locations.

Does the defendant serve or offer to serve interstate travelers? As hereinabove pointed out, the direct evidence produced by plaintiffs that defendant serves or offers to serve interstate travelers is slight, unimpressive and inconclusive; however, from all the circumstances before the court there is no doubt but that defendant has served and is serving interstate travelers. This is apparent from the testimony of a witness who testified that upon presenting herself for service at "Little Joe's Sandwich Shop" no inquiry whatever was made as to her place of residence. Probably of more import is the fact that all five of defendant's drive-ins are located upon much traveled interstate and federal highways with large signs at and about each location advertising its products. Defendant also advertises for business in daily newspapers and over the radio. Moreover, it employs no reasonably effective means of determining whether its customers are inter or intra-state travelers. The court, therefore, concludes that defendant serves or offers to serve interstate travelers at all of its locations.

Having concluded that all of defendant's establishments "affect commerce" within the provisions of Section 2000a

(c)(2) of the Act, the third and last question for determination arises from the construction to be given to subsection (b)(2) of said section of the Act which provides that "any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility *principally engaged in selling food for consumption on the premises*" [emphasis added] is a place of public accommodation within the meaning of the Act.

Do defendants' drive-ins and sandwich shop come within the ambit of the Act as intended by Congress? The court has no difficulty in deciding that "Little Joe's Sandwich Shop" is within the coverage of the Act. It comes within the usual and customary definition of a restaurant, lunchroom, lunch counter, or other eating establishment mainly engaged in serving food for on-the-premises consumption. It caters to walk-in customers who are furnished tables and chairs, including a balcony, where they may, and generally do, sit down and consume their orders within the building. Its facilities, operation, and clientele are entirely different to those of the five drive-ins, which have no such accommodations for diners to walk into buildings to be served and to eat inside. They cater entirely to motorized customers who do not alight from their automobiles to order or eat, whose orders are served in disposable containers, and fifty percent of all food served to them is consumed off the premises.

By limiting the scope of places of public accommodation to restaurants, cafeterias, lunchrooms, soda fountains, and other facilities principally engaged in serving food for consumption on the premises, it is only reasonable to assume that Congress did not intend to include within cover-

age of the Act such eating places as defendant's drive-ins, which do not in the main provide its patrons with facilities to be seated so that their orders may be and generally are eaten on the premises. None of the reported cases dealing with eating houses has considered this aspect of the Act. Both *McClung* and *Pickrick Restaurant, supra,* involved conventional type restaurants which served their customers while seated at tables and who consumed the food entirely on the premises. Surely if Congress had intended to include within the public accommodations provisions of the Act all public eating establishments which it determined "affect commerce" if they meet either of the alternate tests of Section 2000a(c)(2), then its including in Subsection (b)(2) of said Section the phrase "or other facility principally engaged in selling food for consumption on the premises" would be totally futile and meaningless. Our review of the Act's legislative history, committee reports, and congressional debates has failed to indicate a contrary motivation. The court must assume from its verbage that Congress intended to limit the coverage of the Act to those eating places primarily engaged in serving food for on-the-premises consumption.[9]

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[9] Whether "principally engaged in the sale of food for consumption on the premises" qualifies "any restaurant, cafeteria, lunchroom, lunch counter, soda fountain" or only "other facility" has opposing persuasions. The House Report of the Committee on the Judiciary, 2 *U. S. Cong. & Admin. News 1964* p. 2391, 2395 reads as follows:

> "*Section 201(b)* defines certain establishments to be places of public accommodation if their operations affect commerce . . . These establishments are . . . (2) restaurants, lunch counters, *and similar establishments,* including those located in a retail store; and gasoline stations." (Emphasis added.) By this statement the inference could be drawn that the disjunctive

Indeed this court has no motive, intent or purpose to extend by judicial fiat any of the provisions of the Civil Rights Act of 1964 beyond the scope clearly enunciated and adopted by Congress.

Although it has been stated that the term restaurant has no definite legal meaning unless defined by statute, Congress was well aware that an eating place or a restaurant in the generally accepted sense is defined as follows: "A public place where food is sold casual guests to be eaten upon the premises; a house where cooked provisions are sold, to be eaten on the premises; a house where cooked provisions are sold, to be eaten on the premises; a house where food is sold to customers; a place of resort for meals." 28 C. J. S. pp. 825-826. In *State* v. *Shoaf*, 179 N. C. 744, 102 S. E. 705 (1920), the Supreme Court of North Carolina in applying a Sunday law stated:

> "The terms 'restaurant' and 'cafe', in common parlance . . . are substantially synonymous. A restaurant is generally understood to be a place where refreshments, food, and drink are served . . . while the word 'restaurant' has no strictly defined meaning, it seems to be used indiscriminately as a name for all places

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"or" in Section 201(b), as enacted, limited the qualifying phrase to "other facility". In other words, "or other facility principally engaged in selling food for consumption on the premises" means only "and similar establishments". The court, however, is persuaded in that "other" as used in its primary sense of "one of two or more" requires the qualifying phrase to be read with "any restaurant, cafeteria, lunchroom, lunch counter, soda fountain" or at least required to be used to define "restaurant, lunchroom, luneh counter, soda fountain."

where refreshments can be had, from a mere eating house and cookshop to any other place where *eatables are furnished to be consumed on the premises.*" (Emphasis added.) See also the annotation in 122 A. L. R. page 1399.

Even if defendant's drive-ins were found to be restaurants or eating places within the popular and usual definition, they should not be considered as facilities "principally engaged in selling food for consumption on the premises". The adverb "principally" is defined as "primarily; chiefly, mainly, in the principal manner, in the chief place or degree". Webster's International Dictionary, Second Edition. Under the plain meaning of the phrase one who serves fifty percent or less of its food which is taken away and eaten off the premises cannot be held to be *principally* engaged in selling food for consumption on the premises. The uncontradicted evidence before the court is that only fifty percent of the food served at defendant's drive-ins is consumed off the premises, and all of its patrons are encouraged to take their orders elsewhere for consumption.

The court therefore concludes that defendant's five drive-in establishments are not principally engaged in serving food for on the premises consumption, and are not places of public accommodation within the meaning and purview of the Civil Rights Act of 1964; thus, plaintiffs are not entitled to the demanded relief as to them. On the other hand it is concluded that "Little Joe's Sandwich Shop" is principally engaged in selling food for consumption on the premises, and is therefore a place of public accommodation with the Act. As to it, plaintiffs have established their right to the requested relief. It is, therefore,

ORDERED that an injunction will issue in the following terms:

(a) The defendants, Piggie Park Enterprises, Inc., and L. Maurice Bessinger, their agents, employees, successors, and all persons acting in concert with them, and at their direction, are enjoined from refusing to admit Negroes to the premises of Piggie Park No. 7, also known as "Little Joe's Sandwich Shop", located at 1430 Main Street, Columbia, South Carolina, upon the same basis and upon the same conditions that non-Negro members of the general public are admitted to said establishment;

(b) They are also enjoined from failing or refusing to sell food, meals, or other merchandise and to provide services, facilities, privileges, advantages and accommodations to Negro patrons at said establishment upon the same basis and upon the same conditions that they are made available to patrons and customers of other races.

In order that the defendants may have an opportunity to appeal, and if they so desire to seek a stay of this order until such appeal is consummated, it is ORDERED that the foregoing injunction shall become effective thirty days from the date hereof, to wit, on the 27th day of August, 1966. Court costs exclusive of attorneys' fees are hereby awarded to plaintiffs. Let judgment be entered accordingly.

CHARLES E. SIMONS, JR.
United States District Judge

Charleston, South Carolina,
July 27th, 1966.

Opinion of the United States Court of Appeals for the Fourth Circuit

(Filed: April 24, 1967)

CRAVEN, Circuit Judge:

This is a class action brought to obtain injunctive relief and the award of counsel fees under Title II of the Civil Rights Act of 1964, 42 U.S.C.A. §§ 2000a to a-6. Plaintiffs appeal from the decision of the district court holding that Negro citizens may be barred on account of their race and color from buying and eating barbecue at certain drive-in restaurants in South Carolina. We disagree and reverse.*

The facts as found by the district court are not in dispute. Briefly stated,[1] Piggy Park Enterprises, Inc. (L. Maurice Bessinger is the principal stockholder and general manager) owns and operates five eating establishments specializing in southern style barbecue, all of which are located on or near interstate highways.[2]

All of Piggy Park's eating places are of the drive-in type. In order to be served, a customer drives upon the premises in his automobile and places his order through an intercom. When he pushes a button, his order is taken by an employee inside the building who is usually out of sight of the customer. A curb attendant delivers the food or beverage to the customer's car and collects for the same.

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* Judge J. Spencer Bell voted in conference with the other members of the court to reverse. His untimely death on March 19, 1967, prevented his participation in the preparation of this opinion.

[1] For a detailed statement see *Newman* v. *Piggy Park Enterprises, Inc.*, 256 F. Supp. 941 (D.S.C. 1966).

[2] There was a sixth place, known as Little Joe's Sandwich Shop, held by the district court to be within 42 U.S.C.A. § 2000a(b)(2). Injunctive relief was granted and no appeal was taken.

Orders are served in disposable paper plates and cups. The food is served in such a way that it is ready for consumption. Half the customers eat it in their automobiles while parked on the premises. There are no tables, chairs, counters, bars, or stools at any of the drive-ins sufficient to accommodate any appreciable number of patrons.

Although Piggy Park and Bessinger denied in their Answer and two amended Answers that plaintiffs had been denied service at one or more of Piggy Park's drive-ins, it was uncontested at the trial that Piggy Park denied full and equal service to Negroes because of their race at all of its eating places.[3]

The district court erroneously concluded that Piggy Park's drive-ins were not covered by the federal public accommodations law contained in the Civil Rights Act of 1964.[4] The court reasoned that the statute would not apply

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[3] The few Negro customers who have been served took their places and picked up their orders at the kitchen windows. They were not permitted to consume their purchases on the premises.

[4] The pertinent provisions of the Act are:

"§ 2000a. Prohibition against discrimination or segregation in places of public accommodation—Equal access

"(a) All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.

. . . .

"(b) Each of the following establishments which serves the public is a place of public accommodation within the meaning of this subchapter if its operations affect commerce, or if discrimination or segregation by it is supported by State action:

to a drive-in eating place unless a majority of the prepared food sold was actually consumed by the customers on the premises. It found from the testimony of Mr. Bessinger that fifty percent of his food volume was consumed on the premises and fifty percent off the premises, and from that finding of fact concluded that the drive-ins were *not* facilities "principally engaged in selling food for consumption on the premises."

Such a construction, we think, finds no support in congressional history. The Congress did not intend coverage of the Act to depend upon a head count of how many people eat on the premises or a computation of poundage or volume of food eaten. If it had so intended, it would have been a simple matter to change the questioned phrase "for consumption on the premises" to read "actually consumed on the premises."

"(1) . . . .

"(2) any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility, principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment; or any gasoline station;

"(3) . . . ; and

"(4) . . . .

"(c) The operations of an establishment affect commerce within the meaning of this subchapter if (1) . . . . (2) in the case of an establishment described in paragraph (2) of subsection (b) of this section, it serves or offers to serve interstate travelers or a substantial portion of the food which it serves, or gasoline or other products which it sells, has moved in commerce; . . ." 42 U.S.C.A. § 2000a(a)-(c).

During the House hearings,[5] the Attorney General said "the areas of coverage should be clear to both the proprietors and the public." If the "commerce" tests[6] are the principal criteria, and we think they are, clarity of coverage is promoted. A traveler can then intelligently assume that an eating place on an *interstate* highway is covered. Under the district court's fifty percent test of actual consumption on the premises, prospective Negro customers would have no idea whether or not they might be served and would continue to occupy the intolerable position—at least with respect to drive-ins—in which they found themselves prior to passage of the Act with respect to interstate travel.[7] In a mobile society, the ready availability of prepared, ready-to-eat food is a practical necessity—not a luxury.

In our view, the emphasis in the phrase "principally engaged in selling *food* for consumption on the premises" is properly on the word "food". The term "principally" did not appear in the bill as introduced. It was added by the House Judiciary Committee and retained in the same form when the House version of the coverage provisions was ultimately adopted in the Senate. Its inclusion was not

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[5] *Hearings on H.R. 7152 Before the House Committee on the Judiciary*, 88th Cong., 1st Sess., pt. 4, at 2655 (1963).

[6] There are two in the disjunctive:

> "(c) The operations of an establishment affect commerce . . . if . . . it serves or offers to serve interstate travelers *or* a substantial portion of the food which it serves . . . has moved in commerce." 42 U.S.C.A. § 2000a(c).

[7] That the test is absurdly impractical is illustrated by Bessinger's testimony that consumption on premises varied with the weather. On such a hypothesis, a given drive-in might be covered one day, week, or month, and not at other times.

intended to have any bearing upon the percentage of food consumed on the premises, but was intended only to exclude from coverage places where food service was incidental to some other business, *e.g.*, bars and "Mrs. Murphy" tourist homes serving breakfast as a matter of convenience to overnite lodgers. Given the intention of Congress to eliminate bars,[8] the meaning of "principally" comes into clear focus. Nothing in the 1964 Act as introduced or in any revision made before its enactment except for the addition of the word "principally" would exclude bars (and other places such as bowling alleys and pool rooms) serving food as an incident to other business.

The words in the statute "for consumption on the premises" modify the prior word "food" and describe the *kind* of food sold by other facilities that are covered similar to restaurants, cafeterias, lunchrooms, lunch counters, and soda fountains. The Congress clearly meant to extend its power beyond the ordinary sit-down restaurant and just as clearly did not undertake to legislate with respect to grocery type food stores which would have been covered but for the modifying phrase "for consumption on the premises." Thus, food stores are *not* covered, but stores (or facilities) that sell food of a *particular type, i.e.*, ready for consumption on the premises, *are* covered. What

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[8] See statement of Senator Magnuson, Chairman of the Senate Committee on Commerce and principal floor spokesman in the Senate for Title II, that "a bar in the strict sense of that word would not be covered by Title II since it is not 'principally engaged in selling food for consumption on the premises'." 110 Cong. Rec. 7406 (1964).

We find no legislative history suggesting that "principally" was inserted to eliminate eating places doing a predominantly carry-out service.

the customers actually *do* with the ready-to-eat food was not the concern of the Congress—whether they eat it then and there or subsequently and elsewhere.

The sense of this plan of coverage is apparent. Retail stores, food markets, and the like were excluded from the Act for the policy reason that there was little, if any, discrimination in the operation of them. Negroes have long been welcomed as customers in such stores. See 110 Cong. Rec. 6533 (1964) (remarks of Senator Humphrey).

Discrimination with respect to ready-to-eat food service facilities *was* a problem. When a substantial minority of American citizens are denied restaurant facilities—whether sit-down or drive-in—that are open to the public, unquestionably interstate commerce is burdened. *Katzenbach* v. *McClung*, 379 U.S. 294 (1964). It was this evil the Congress sought to eliminate to the end that *all* citizens might freely and not inconveniently travel between the states. We think the Congress plainly meant to include within the coverage of the Act all restaurants, cafeterias, lunchrooms, lunch counters, soda fountains, and *all other facilities* similarly engaged as a main part of their business in selling food ready for consumption on the premises. We are further of the opinion that the statutory language accomplished that purpose.

COUNSEL FEES

Title II as a whole demonstrates that the Congress intended to assure rapid and effective compliance with its terms.[9] 42 U.S.C.A. Section 2000a-3(b) authorizes the court,

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[9] Thus, 42 U.S.C.A. § 2000a-3(a) permits intervention by the Attorney General in privately initiated public accommodations suits,

in its discretion, to allow the prevailing party (other than the United States) a reasonable attorney's fee as part of the costs. By reason of our reversal of the district court, the plaintiffs now become the "prevailing party", and on remand we instruct the district court to consider the allowance of counsel fees, whether in whole or in part.

In exercising its discretion, the district court may properly consider whether any of the numerous defenses interposed by defendants were presented for purposes of delay and not in good faith. But the test should be a subjective one, for no litigant ought to be punished under the guise of an award of counsel fees (or in any other manner) from taking a position in court in which he honestly believes—however lacking in merit that position may be.

The court may also consider whether the defendants acted in good faith in denying discrimination against Negroes and thus requiring proof of what was subsequently conceded to be true. A litigant who increases the burden upon opposing counsel by such tactics ought ordinarily bear the cost of unnecessary trial preparation. The so-called "general denial" is not countenanced by the Federal Rules of Civil Procedure.

Reversed and Remanded for Consideration of the Award of Counsel Fees.

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appointment of counsel for a person aggrieved, and "the commencement of the civil action without the payment of fees, costs or security." 42 U.S.C.A. § 2000a-5 authorizes the Attorney General to commence litigation where there is "a pattern or practice of resistance to the full enjoyment" of Title II rights. 42 U.S.C.A. § 2000a-2 broadly prohibits any attempt to punish, deprive, or interfere with rights to equal public accommodations. See *Georgia* v. *Rachel*, 384 U.S. 780 (1966).

WINTER, Circuit Judge, with whom SOBELOFF, Circuit Judge, joins, concurring specially:

Wholeheartedly I agree that Title II of the Civil Rights Act of 1964, 42 U.S.C.A. § 2000a, *et seq.*, is applicable to Piggie Park's drive-in type facilities, and I join in the reasons advanced for that conclusion. I agree also that the case should be remanded for consideration of an award of counsel fees, but I conclude that good faith, standing alone, should not always immunize a defendant from an award against him. Specifically, in this case, defendants are not entitled to the defense of good faith in regard to the major portion of their defenses.

The district judge is told that in exercising his discretion he should "consider whether any of the numerous defenses interposed by defendants were presented for purposes of delay and not in good faith," because no defendant ought to be punished for "taking a position in court in which he honestly believes—*however lacking in merit that position may be.*" (emphasis supplied) In this case, defendants interposed defenses patently frivolous, and I would not permit them to avoid the costs of overcoming such defenses on a purely subjective test of good faith.

In providing for counsel fees, the manifest purposes of the Act are to discourage violations, to encourage complaints by those subjected to discrimination and to provide a speedy and efficient remedy for those discriminated against. If counsel fees are withheld or grudgingly granted, violators feel no sanctions, victims are frustrated and instances of unquestionably illegal discrimination may well go without effective remedy. To immunize defendants from

an award of counsel fees, honest beliefs should bear some reasonable relation to reality; never should frivolity go unrecognized.

While the threat of an award of counsel fees ought not be used to discourage non-frivolous defenses asserted in good faith, the district court should be instructed to make an allowance in regard to some of defendants' defenses and, in its discretion, to consider an allowance for the remainder of defendants' defenses depending upon its determination of defendants' good faith and honest belief. Those clearly compensable are defendants' assertion that their "Little Joe's Sandwich Shop," a sit-down facility shown overwhelmingly by the proof to be a place where service was refused to Negro citizens, was not subject to the Act. The fact that the defendants had discriminated both at Piggie Park's drive-ins and at Little Joe's Sandwich Shop was of course known to them, yet they denied the fact and made it necessary for the plaintiffs to offer proof, and the defendants could not and did not undertake at the trial to support their denials. Includable in the same category are defendants' contention, twice pleaded after the decision in *Katzenbach* v. *McClung*, 379 U. S. 294 (1964), that the Act was unconstitutional on the very grounds foreclosed by *McClung;* and defendants' contention that the Act was invalid because it "contravenes the will of God" and constitutes an interference with the "free exercise of the Defendant's religion." The district judge should be told that, in awarding counsel fees, he should include an amount which fully compensates plaintiffs for the time, effort and expenses of counsel in overcoming these elements of expense needlessly imposed on them.

Only as to the remaining defenses do I think that defendants' good faith is the issue. If good faith is found not to have existed as to them, an additional award of counsel fees on a like basis should be made.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 289

ANNE P. NEWMAN, SHARON W. NEAL
and JOHN MUNGIN,

Petitioners,

—v.—

PIGGIE PARK ENTERPRISES, INC., a corporation
and L. MAURICE BESSINGER,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR PETITIONERS

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IN THE

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ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR PETITIONERS

Opinions Below

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 377 F. 2d 433 (A. 159a). The opinion of the United States District Court for the District of South Carolina is reported at 256 F. Supp. 941 (A. 135a).

Jurisdiction

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on April 24, 1967. The petition for a writ of certiorari was granted October 9, 1967. Jurisdiction of this Court is invoked pursuant to 28 U. S. C. §1254(1).

Question Presented

Whether the Court of Appeals correctly construed Title II of the Civil Rights Act of 1964 as denying recovery of counsel fees by Negroes excluded from places of public accommodation unless a showing is made that a restaurateur's patently frivolous defenses and obstructive tactics were the product of dishonesty and bad faith.

Statutory Provisions Involved

This case involves Title II of the Civil Rights Act of 1964, 42 U. S. C. §§2000a et seq., and more particularly, 42 U. S. C. §2000a-3(b):

> In any action commenced pursuant to this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs. . . .

Statement

Negro plaintiffs instituted this class action December 18, 1964 against the corporate operator of a chain of six restaurants and its president and principal stockholder,

L. Maurice Bessinger, seeking injunctive relief prohibiting exclusion of Negroes and recovery of counsel fees pursuant to the Civil Rights Act of 1964, 42 U. S. C. §§2000a et seq. The complaint alleged, in summary, that at various locations in South Carolina the corporation operates restaurants which affect commerce and where Negroes are refused service (A. 2a-8a).

Defendants answered by denying Negroes were refused service; that operation of the restaurants affected commerce; and that the restaurants were places of "public accommodation" as that term is defined in the Civil Rights Act of 1964.[1] Defendants asserted that Title II is unconstitutional in violation of the Commerce Clause (Art. I, §8); the Privileges and Immunities Clause (Art. IV, §2); the Due Process and Equal Protection Clauses of the Fourteenth Amendment; and the Thirteenth Amendment to the Constitution of the United States. In addition, the corporation president alleged that service of food to Negroes, as required by Title II, violated his freedom of religion as protected by the First Amendment (A. 9a-21a).

After a two day trial, April 4-5 (A. 22a-134a), the district court found that the corporation operates six eating places, five of which are drive-ins located on major highways (A. 140a-141a). The sixth, Little Joe's Sandwich Shop, is in downtown Columbia, South Carolina, with tables and chairs for approximately sixty customers (A. 141a-143a). The district court found "at least" forty percent of the food purchased by the restaurants each year moved in commerce (A. 143a) and that the restaurants served many

[1] Defendants filed an answer February 5, 1965, an amended answer August 23, 1965, and were permitted by the district court to file a second amended answer March 19, 1966. All generally denied the allegations of the complaint.

interstate travelers (A. 145a). It concluded for both reasons that the operation of the six restaurants affected commerce within the meaning of Title II, 42 U. S. C. §2000a-(c)(2).

Despite denials of Negro exclusion in the pleadings, the president of the corporation, a corporation bookkeeper, and a waitress testified that Negroes were served only on a kitchen door take-out basis (A. 91a, 98a, 101a, 118a). The district court found also that two plaintiffs had been denied service at one of the restaurants because of race (A. 143a-144a). Attorneys for the plaintiffs were forced to spend substantial time before the trial amassing evidence to rebut defendants' denials in the pleadings that a substantial amount of the food it served moved in commerce. A large portion of the two day trial was devoted to proving that the beef, sugar, Coca-cola, vegetables, cheese, salt and other produce used by defendants came from outside South Carolina. (These pages of the original record were not printed by petitioners, in the interests of keeping the Appendix concise.) (R. pp. 20-110).

Although the district court found discrimination, and that operation of the six restaurants affected commerce, it excluded the five drive-ins from coverage on the ground that Congress had not intended Title II to apply to drive-ins. It entered an order enjoining racial discrimination at the Sandwich Shop only, and awarded Negro plaintiffs their costs, but refused to award counsel fees (A. 158a).

Plaintiffs appealed to the United States Court of Appeals for the Fourth Circuit; the United States filed a brief *Amicus Curiae* which supported plaintiffs' position that the drive-in restaurants were covered by the Act and did not direct itself to the counsel fee issue. The Court of

Appeals, sitting *en banc*, agreed, holding that the district court should have enjoined racial discrimination at all restaurants operated by the defendants.

The Court of Appeals further instructed the district court "to consider the allowance of counsel fees, whether in whole or in part," and set forth the "subjective" test which district courts should apply to determine whether to permit recovery of counsel fees (A. 165a):

> In exercising its discretion, the district court may properly consider whether any of the numerous defenses interposed by defendants were presented for purposes of delay and not in good faith. But the test should be a subjective one, for no litigant ought to be punished under the guise of an award of counsel fees (or in any other manner) from [*sic*] taking a position in court in which he honestly believes—however lacking in merit that position may be.

Judge Winter, with whom Judge Sobeloff joined, disagreed with the majority conclusion that "good faith, standing alone," should "immunize a defendant from an award against him." Judge Winter examined the relationship of the provision for recovery of counsel fees to enforcement of Title II, and concluded that a "subjective" test would frustrate compliance (A. 166a-167a):

> In providing for counsel fees, the manifest purposes of the Act are to discourage violations, to encourage complaints by those subjected to discrimination and to provide a speedy and efficient remedy for those discriminated against. If counsel fees are withheld or grudgingly granted, violators feel no sanctions, vic-

tims are frustrated and instances of unquestionably illegal discrimination may well go without effective remedy. To immunize defendants from an award of counsel fees, honest beliefs should bear some reasonable relation to reality; never should frivolity go unrecognized.

Petitioners are represented by retained private counsel of Columbia, South Carolina, who have been assisted by salaried attorneys of a nonprofit civil rights organization. The award of counsel fees is sought only by the retained South Carolina counsel for their services, and not for others.

Summary of Argument

Congress has left to the courts the determination of the proper standards for awarding reasonable attorneys' fees in cases arising under the public accommodations title of the Civil Rights Act of 1964. Petitioners submit that the subjective bad faith standard formulated by the court below is improper because it fails utterly to further the purposes of the Act, and in fact inhibits them. To require proof of an insincere state of mind is unworkable, inconsistent with the legislative history, and holds Congress to have done no more than codify a pre-existing equity power of the federal courts.

The purpose of the counsel fee provision is to avoid personal financial loss to private plaintiffs who perform an essentially public function when they bring injunction actions to desegregate facilities which have failed to comply with the law, and to encourage attorneys to take Title II cases. The standard which best effectuates this purpose

allows counsel fees to prevailing plaintiffs as a matter of course, absent unusual circumstances. The formulation of the judges concurring specially below—award of counsel fees only when defendants raise frivolous defenses or employ dilatory tactics—is also a workable standard. It would deter vexatious conduct once suit was filed but it would not materially advance the public policy of Title II by encouraging initiation of Title II actions against recalcitrant discriminators. Under either the standard urged by petitioners or that formulated by the concurring judges below, the judgment below should be vacated and the cause remanded to the courts below with instructions that counsel fees should be awarded to these petitioners.

ARGUMENT

I.

Whether Counsel Fees Are Awarded to a Prevailing Plaintiff Under the Public Accommodations Title of the Civil Rights Act of 1964 Should Not Turn on the Subjective Mental State of the Defendant.

The counsel fees provision of Title II of the Civil Rights Act of 1964, 42 U. S. C. §2000a *et seq.*, is an integral part of a comprehensive scheme to secure civil rights for all Americans without regard to race. Enactment of this statute marked a watershed in the history of race relations in America, and the public accommodations title has become the most conspicuous symbol of the change. Congress undertook to write a sweeping law which would bring about the maximum desegregation of public accommodations in the shortest possible time. For the Act to be successful,

compliance with it had to be universal, for reasons both psychological and economic. First, not much would be accomplished if only some restaurants and lodges desegregated, for it is scant consolation to the Negro traveler that many facilities are desegregated if the one he enters continues to discriminate. Second, commerce is burdened by uncertainty itself when not all eating facilities have desegregated. And third, individual covered establishments in some communities might find it profitable to avoid compliance if they could avoid being brought to task. Congress therefore enacted "most comprehensive" substantive provisions, see *Heart of Atlanta Motel* v. *United States,* 379 U. S. 241, 246 (1964), which extended the coverage of the Act to the constitutional limits of the Commerce power, 42 U. S. C. §§2000a (b) (1-4), 2000a (c), and the power of Congress under the Fourteenth Amendment, 42 U. S. C. §§2000a (d), 2000a-1, and prohibited any attempt to deprive any person of his rights under the Act, 42 U. S. C. §2000a-2; see *Hamm* v. *City of Rock Hill,* 379 U. S. 306 (1964); *Georgia* v. *Rachel,* 384 U. S. 780 (1966). In addition, Title II comprises a series of related provisions, including the section on counsel fees, which provide for rapid and effective enforcement of the newly created statutory rights and in many ways encourage use of the federal courts against recalcitrant public accommodations: by permitting the "commencement of the civil action without the payment of fees, costs, or security" where necessary, 42 U. S. C. §2000a-3; by permitting the United States Attorney General to bring civil actions for injunctive relief when a pattern or practice of discrimination exists, 42 U. S. C. §2000a-5 (a); by authorizing three-judge courts to hear suits of general public importance, 42 U. S. C. §2000a-5 (b); and by suspending, in Title II suits, the doc-

trine of exhaustion of administrative remedies, 42 U. S. C. §2000a-6(a). These sections, like the counsel fee section, were drafted in response to the desire of Congress to provide Negro plaintiffs with easy access to the courts for redress of grievances, so that demonstrations like those preceding passage of the law would not be necessary in the future.

A. *The Fourth Circuit's standard.*

Central to the provisions for enforcement of Title II is the counsel fee provision, 42 U. S. C. §2000a-3(b). The legislative history of this section is meager, but by making the award of counsel fees discretionary, Congress evidently left it to the courts to evolve standards for the implementation of this section which would best advance the purposes of the Act. What little the legislative history reveals is inconsistent with the majority opinion below—awarding attorneys' fees only where the defendant was in subjective bad faith. Senator Miller, opposing an amendment that would have deleted this section, suggested that attorneys' fees would be granted in "meritorious" cases, 110 Cong. Rec. 14214, June 17, 1964, and neither he nor anyone else suggested that a subjective mental state evincing bad motives was to be a prerequisite for an award of reasonable fees. Three other factors also demonstrate that the subjective bad faith standard is not a proper construction of 42 U. S. C. §2000a-3(b). First, such a construction holds Congress to have done nothing more in the section than codify existing law, for long before the Civil Rights Act, federal district courts had inherent power to do what the Fourth Circuit's reading of the section authorizes; that is, to award counsel fees to a successful plaintiff where a defense is maintained "in bad faith, vexatiously, wantonly, or for oppressive reasons." 6 Moore's Federal Practice

1352. See *Vaughn* v. *Atkinson*, 369 U. S. 527 (1962). And for years federal courts have been imposing such costs in racial discrimination cases where manifest insincerity and bad faith have been shown. *Bell* v. *School Board of Powhatan County*, 321 F. 2d 494 (4th Cir. 1963); *Rolax* v. *Atlantic Coast Line R.R.*, 186 F. 2d 473 (4th Cir. 1951). Statutes authorizing awards of counsel fees in private litigation are unusual departures from the general American rule of letting the costs of counsel lie with the party hiring counsel; such statutes should not be read to add nothing to the power of the federal courts. This conclusion is bolstered by the fact that the Senate rejected a move to delete the counsel fee provision on the ground that to grant counsel fees conflicted with the prevailing practice, 110 Cong. Rec. 14214 (June 17, 1964).

Second, the court below said that "the test should be a subjective one, for no litigant ought to be punished . . . from *(sic)* taking a position in court in which he honestly believes—however lacking in merit that position may be" (A. 165a). But it will rarely be possible for a plaintiff to prove the subjective state of mind of a defendant. This is a fact about which all of the evidence is in the defendant's possession. Occasionally a defendant may make a statement during trial reflecting on his state of mind which will be adverse to his position, but the award of reasonable counsel fees could not have been intended to turn upon such a fortuity which bears no rational relationship to increasing the extent of desegregation.

Finally, it seems impossible to apply a subjective standard at all where, as is often the case and is the case here, a defendant is a corporation. Just whose intent the district court is to look to under the Fourth Circuit standard is

unclear. The general counsel's, since he decides which defenses to interpose? What if the company has more than one counsel, and each attorney has a different state of mind? Should the court look to the intent of the directors on the theory that they directed the work of the counsel and are generally responsible for what he does? Again, what if the directors differed in whether they "honestly believed" that a defense was a serious one? Of what relevance are the beliefs on the stockholders, the true owners of the defendant corporation? All of these considerations make it unreasonable to interpret §2000a-3(b) to require a vexatious state of mind.

B. *The standard which best effectuates the ends of Title II.*

In order to determine the counsel fee standard which best effectuates the purposes of Title II it is necessary to examine the function of the private remedy which Congress authorized. It was plain when Congress passed the Act that to the extent universal voluntary compliance was not achieved, widespread use of the courts would be necessary to ensure maximum desegregation. In fact although voluntary compliance was quickly achieved in many major cities, and large chain restaurants and lodges adhered to the Act immediately, hundreds of smaller establishments, particularly in the small cities and rural areas of the South, have not yet conformed to the Act.[2] Hundreds of suits will be

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[2] As a recent survey by the New York Times ("Integration in South: Erratic Pattern") put it:

> It is possible to motor through the green valleys of Virginia, veer through the cotton fields in Alabama and Mississippi, and

necessary before equal access to all public accommodations in the South is a reality. Since the Justice Department could not be burdened with hundreds of suits of this type, Congress limited the Department's role to cases involving a "pattern or practice of resistance", and relied primarily on private litigants to bring the bulk of the lawsuits necessitated by obduracy. The counsel fee provision is crucial to this enforcement device. Plaintiffs under the Act may secure only injunctive relief, never damages. Yet the time and effort which a plaintiff's attorney must put into preparing and arguing a contested case are frequently substantial, as is shown by this record, especially when the proportion of food the facility purchases in interstate commerce must be proved. Relatively few Negroes are likely to bring a suit if they are required to spend significant amounts of their money to integrate each diner at which they desired to eat, and few attorneys are likely to waive a fee. Nor should they have to. When a Negro brings an injunctive suit, he does so not only for himself, but for all Negroes and whites who wish to eat in integrated facilities, and even for hundreds of thousands of Americans who will never eat at the defendant's establishment, but who, through their representatives, chose to make this a country in which no man was afforded second-class citizenship be-

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end up in Texas cattle country with the conviction that racial segregation and discrimination are gone at last.

You could get that impression if you dined at chain restaurants like Howard Johnson's, slept in chain motels such as the Holiday Inns, . . .

A different itinerary might leave you convinced that the South has not changed at all. Asking for a night's lodging in an obscure motel can be risky for a Negro who wants to avoid embarrassment. And in countless small towns, independent restaurants cater mainly to an all-white clientele, and Negroes still watch movies from segregated balconies. (N. Y. Times, May 29, 1967, p. 1, col. 1.)

cause of the color of his skin. A Title II suit is a private action in form only; it is in reality a public suit, and the plaintiff is in effect a "private attorney-general" advancing a public policy of the highest priority. *Cf.*, Comment, Private Attorneys-General: Group Action on the Fight for Civil Liberties, 58 Yale L. J. 574 (1949). The many enforcement provisions of the Act, *supra* at p. 8 are designed to encourage such litigation by individual plaintiffs, on behalf of this wider public interest. The counsel fee provision, properly construed, is a key feature in rendering this system workable. Negro plaintiffs must have a certain amount of motivation and perhaps courage, but Congress has designed the statute so that they need not be wealthy, and neither they nor their attorneys need subsidize a public activity from their own pockets.[3] It is because the court below misconstrued the nature of a Title II suit that it arrived at too limited a formulation of the conditions for an award of counsel fees. Public accommodations do not have a right to maintain segregated facilities

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[3] The theory that the purpose of counsel fees may be to encourage "public" litigation by private parties, by saving them whole should they win, is an accepted device. For example, in Oregon, union members who succeed in suing union officers guilty of wrongdoing are entitled to counsel fees both at the trial level and on appeal, because they are protecting an interest of the general public:

> If those who wish to preserve the internal democracy of the union are required to pay out of their own pockets the cost of employing counsel, they are not apt to take legal action to correct the abuse. . . . The allowance of attorneys' fees both in the trial court and on appeal will tend to encourage union members to bring into court their complaints of union mismanagement and thus the public interest as well as the interest of the union will be served.

Gilbert v. *Hoisting & Portable Engineers*, 237 Or. 139, 390 P. 2d 320 (1964). See also *Rolax* v. *Atlantic Coast Line R.R.*, 186 F. 2d 473 (4th Cir. 1951).

until sued. They have a duty to integrate. The purpose of the counsel fee section is not merely to punish a defendant who adopts obstructionist tactics during a trial which should never have been required in the first place; rather, the purpose is to encourage the bringing of suits against public accommodations which fail to perform their basic obligations under the Act.

The construction of §2000a-3(b) which best promotes these ends is for the lower courts always to presume that prevailing plaintiffs are entitled to counsel fees unless very special circumstances render such a disposition unjust.[4] Prevailing defendants, on the other hand, need not routinely receive counsel fees. No analogous public policy encourages restaurants just beyond the coverage of the Act to resist integration by every means possible. Though the Act permits district courts to award counsel fees to the prevailing "party", it would be sufficient to award such fees to a prevailing defendant only when the initiation or conduct of plaintiff's suit was manifestly frivolous (as, for example, when another plaintiff had just lost a suit against the same defendant). Such standards ideally serve the function of the Act: they promote integration of public accommodations. They do not render §2000a-3(b) subject to the objection which has thus far prevented awards of counsel fees to the prevailing party from becoming a standard feature of American jurisprudence[5]—that they dis-

[4] For example, it might arguably have been proper to let attorneys' fees rest with the respective parties in the very first case testing the constitutionality of the Act, since defendants challenging the statute on constitutional grounds would also be performing a public function.

[5] In no other country in the world is the prevailing party in a civil suit required to bear the expense of enforcing his just claim. Ehrenzweig, Reimbursement of Counsel Fees and the Great Society, 54 Cal. L. Rev. 792, 793 (1966).

courage the poor from bringing lawsuits because they might have to pay an uncertain amount of defendant's counsel fees. See *Fleischman* v. *Maier Brewing Co.*, 386 U. S. 714, 718 (1967). Nor are they inconsistent with the Act's grant of "discretion" to the district courts. Such discretion is properly applicable to a determination of the "reasonable" amount of fees awarded, rather than whether fees are to be awarded at all.

The above rules will lead to maximum enforcement, which must ultimately depend upon the energies of private litigants. Neither the Department of Justice nor the civil rights organizations have the money or the personnel that would be necessary to bring suits in hundreds of rural communities in the South. Although the Office of Economic Opportunity has sponsored the establishment of 292 "law offices for the poor", only 36 communities have such programs in the eleven states of the Confederacy (and Alabama has none). Significantly, petitioners' counsel has been informed that no neighborhood law office for the poor set up by the Office of Economic Opportunity has participated in a public accommodations case. Hopefully, the grant of counsel fees as a matter of course to plaintiffs successful in integrating public accommodations will not only further the purposes of the Act, but may ultimately involve a much broader segment of the bar in civil rights litigation; private attorneys will be more likely to accept a public accommodations case if they are offered a reasonable likelihood of being able to collect a fee from a solvent business enterprise.

C. *Judge Winter's standard.*

While the standard petitioners recommend will most soundly effectuate the Civil Rights Act, it is not the only workable standard. The interpretation given the counsel fee section by Judges Winter and Sobeloff, concurring specially below (awarding counsel fees against defendants who employ the dilatory tactics or raise objectively frivolous defenses), would at least deter defendants from imposing unnecessary burdens on plaintiffs and then claiming that their defenses, however frivolous, were in good faith. Such a standard would not encourage the bringing of Title II injunctive suits and thereby promote elimination of segregation, but would help significantly to expedite cases once brought.

II.

Under Either the Standard Sought by Petitioners or That Urged by Judges Winter and Sobeloff, the Case Should Be Remanded to the Courts Below With Instructions to Award Counsel Fees to Plaintiff.

The Fourth Circuit, remanding this case, ordered the district court to consider the allowance of counsel fees and added that "the test should be a subjective one" (A. 165a). If this Court agrees either with petitioners or with the concurring judges of the Fourth Circuit, different instructions must be given the district court. If petitioners' standard constitutes the correct construction of the Act, the court should be directed to award counsel fees because no extremely unusual reasons justified defendants in postponing compliance with the Act until after a trial (April 4, 5, 1966), rather than desegregating when the Act was

passed (July 2, 1964) or at the latest when this Court upheld the constitutionality of the law (December 14, 1964).

On the other hand, if the interpretation given the counsel fee section by Judges Winter and Sobeloff is the proper one, the district court should also be directed to award counsel fees, because it is plain that all or nearly all of defendants' defenses were frivolous and only served to increase the difficulty of proving plaintiff's case and put off the date of compliance. Defendants in this case pursued various theories that Title II was unconstitutional years after the question had been definitively resolved by this Court in *Katzenbach* v. *McClung,* 371 U. S. 291, in December, 1964. A second amended answer raising such defenses was filed March 30, 1966, after "carefully reviewing the pleadings heretofore filed" (A. 17a). Defendants also denied their activities affected commerce, forcing petitioners to offer hours of testimony to prove their case. After trial, the district court (which erroneously excluded the drive-in facilities on another ground) had no trouble determining that all six facilities were clearly covered by the Act both because a substantial portion of the corporation's food moved in commerce and because it served or offered to serve interstate travelers. Likewise, "the fact that the defendants had discriminated both at Piggie Park's drive-ins and at Little Joe's Sandwich Shop was, of course known to them, yet they denied the fact and made it necessary for the plaintiffs to offer proof, and the defendants could not and did not undertake at the trial to support their denials" (A. 167a). In addition, defendants interposed a series of utterly frivolous defenses, including claims that the Act was invalid because it "contravenes the will of God", that

it interfered with the "free exercise of Defendant's religion", that it constituted a taking without just compensation, that it denied defendants equal protection of the laws, that it abridged the defendants' privileges and immunities under Article 4, Section 2, and that it imposed on defendants an involuntary servitude. To permit defendants to require plaintiffs or their attorneys to bear the costs of presenting opposition to these defenses would severely restrict the effect of Title II and frustrate the design of Congress.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the judgment below be vacated and the cause be remanded to the courts below with directions to award counsel fees to petitioners.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

No. 339.—October Term, 1967.

Anne P. Newman et al., Petitioners, v. Piggie Park Enterprises, Inc., et al. } On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

[March 18, 1968.]

Per Curiam.

The petitioners instituted this class action under Title II of the Civil Rights Act of 1964, § 204 (a), 78 Stat. 244, 42 U. S. C. § 2000a–3 (a), to enjoin racial discrimination at five drive-in restaurants and a sandwich shop owned and operated by the respondents in South Carolina. The District Court held that the operation of each of the respondent's restaurants affected commerce within the meaning of § 201 (c)(2), 78 Stat. 243, 42 U. S. C. § 2000a (c)(2), and found, on undisputed evidence, that Negroes had been discriminated against at all six of the restaurants. 256 F. Supp. 941, 947, 951. But the District Court erroneously concluded that Title II does not cover drive-in restaurants of the sort involved in this case. 256 F. Supp., at 951–953. Thus the court enjoined racial discrimination only at the respondents' sandwich shop. *Id.*, at 953.

The Court of Appeals reversed the District Court's refusal to enjoin discrimination at the drive-in establishments, 377 F. 2d 433, 435–436, and then directed its attention to that section of Title II which provides that "the prevailing party" is entitled to "a reasonable attorney's fee" in the court's "discretion." § 204 (b), 78 Stat. 244, 42 U. S. C. § 2000a–3 (b).[1] In remanding

[1] "In any action commenced pursuant to this subchapter, the court, in its discretion, may allow the prevailing party, other than

the case, the Court of Appeals instructed the District Court to award counsel fees only to the extent that the respondents' defenses had been advanced "for purposes of delay and not in good faith." 377 F. 2d, at 437. We granted certiorari to decide whether this subjective standard properly effectuates the purposes of the counsel-fee provision of Title II of the Civil Rights Act of 1964. 389 U. S. 815. We hold that it does not.

When the Civil Rights Act of 1964 was passed, it was evident that enforcement would prove difficult and that the Nation would have to rely in part upon private litigation as a means of securing broad compliance with the law.[2] A Title II suit is thus private in form only. When a plaintiff brings an action under that Title, he cannot recover damages. If he obtains an injunction, he does so not for himself alone but also as a "private attorney general," vindicating a policy that Congress considered of the highest priority.[3] If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive

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the United States, a reasonable attorney's fee as part of the costs, and the United States shall be liable for costs the same as a private person."

[2] In this connection, it is noteworthy that 42 U. S. C. § 2000a–3 (a) permits intervention by the Attorney General in privately initiated Title II suits "of general public importance" and provides that, "in such circumstances as the court may deem just," a district court may "appoint an attorney for [the] complainant and may authorize the commencement of the civil action without the payment of fees, costs, or security." Only where a "pattern or practice" of discrimination is reasonably believed to exist may the Attorney General himself institute a civil action for injunctive relief. 42 U. S. C. § 2000a–5.

[3] See S. Rep. No. 872, 88th Cong., 2d Sess., pt. 1, at 11, 24 (1964); H. R. Rep. No. 914, 88th Cong., 1st Sess., pt. 1, at 18 (1963); H. R. Rep. No. 914, 88th Cong., 1st Sess., pt. 2, at 1–2 (1963).

powers of the federal courts. Congress therefore enacted the provision for counsel fees—not simply to penalize litigants who deliberately advance arguments they know to be untenable but, more broadly, to encourage individuals injured by racial discrimination to seek judicial relief under Title II.[4]

It follows that one who succeeds in obtaining an injunction under that Title should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust. Because no such circumstances are present here,[5] the District Court on remand should include reasonable counsel fees as part of the costs to be assessed against the respondents. As so modified, the judgment of the Court of Appeals is

Affirmed.

MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.

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[4] If Congress' objective had been to authorize the assessment of attorneys' fees against defendants who make completely groundless contentions for purposes of delay, no new statutory provision would have been necessary, for it has long been held that a federal court may award counsel fees to a successful plaintiff where a defense has been maintained "in bad faith, vexatiously, wantonly, or for oppressive reasons." 6 Moore's Federal Practice, 1352 (1966 ed.).

[5] Indeed, this is not even a borderline case, for the respondents interposed defenses so patently frivolous that a denial of counsel fees to the petitioners would be manifestly inequitable. Thus, for example, the "fact that the defendants had discriminated both at [the] drive-ins and at [the sandwich shop] was . . . denied . . . [although] the defendants could not and did not undertake at the trial to support their denials. Includable in the same category are defendants' contention, twice pleaded after the decision in Katzenbach v. McClung, 379 U. S. 294, . . . that the Act was unconstitutional on the very grounds foreclosed by *McClung;* and defendants' contention that the Act was invalid because it 'contravenes the will of God' and constitutes an interference with the 'free exercise of the Defendant's religion.'" 377 F. 2d 433, 437–438 (separate opinion of Judge Winter).